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Supreme Court of the United States

No. 78-643

October Term, 1978

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

vs.

DAVID L. KIRK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on July 19, 1978 in the above-entitled case.

Opinions Below.

The opinion of the Court of Appeals is officially reported at 578 F.2d 814. The opinion rendered by the District Court for the Central District of California is reported at 432 F.Supp. 627. Both opinions are set forth in the appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 19, 1978 and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether a private suit instituted pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, *et seq.* (hereinafter "Title VII") is subject to a federally-mandated statute of limitations embodied by the terms of Title VII?

2. Whether, in the absence of a federally-mandated period of limitations, a private suit instituted pursuant to Title VII is subject to the most analogous state statute of limitations?

Statutory Provision Involved.

Section 706(f)(1) of Title VII provides in pertinent part:

> "[I]f within one hundred and eighty days from the filing of [a] charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."
>
> Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1).

Statement of Case.

On or about April 27, 1971, respondent, David L. Kirk, filed a charge of employment discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") against his employer, Rockwell International Corporation (hereinafter "Rockwell"). The charge alleged that on or about February 15, 1971, Kirk had been demoted from the position of Material Review Engineer to Material Review Inspector solely on the basis of his race, Caucasian.

On or about May 6, 1971, Kirk received notice from the EEOC that his charge had been referred to the California Fair Employment Practice Commission (hereinafter "FEPC") for investigation. On or about May 26, 1971, the FEPC declined to proceed, at which time the EEOC assumed jurisdiction.

On or about August 17, 1976, Kirk received a letter from the EEOC notifying him that it had not found reasonable cause to believe that his charge was true and that he had the right to file suit within ninety (90) days after receipt of the letter.

On November 11, 1976, Kirk instituted the present action against Rockwell in the United States District Court, Central District of California. When this federal action was filed, over five and one-half years had passed since Kirk had first filed his charge with the EEOC.

Accordingly, the district court dismissed the plaintiff's complaint, holding that (1) state statutes of limitations are applicable to Title VII; and that (2) the state statute of limitations period is not to be tolled during the EEOC's processing of an employment discrimination charge. The court specifically held that plaintiff's action was barred by either California's one-year period applicable to tort liability (Section 340(3) of the California Code of Civil Procedure) or its three-year period applicable to actions based upon liability created by a statute (Section 338(1) of the California Code of Civil Procedure).

On July 19, 1978, the Court of Appeals for the Ninth Circuit reversed the decision of the lower court, holding that no state statute of limitations was applicable to Title VII, since Congress provided time limits

for filing a charge and giving notice to the employer. The Court viewed these limits as a congressionally established statute of limitations.

REASONS FOR GRANTING THE WRIT.

I

This Case Is an Excellent Example of an Important and Recurring Problem Specifically Left Unresolved by the Supreme Court in Occidental Life Ins. Co. v. EEOC: The Absence of a Conventional Statute of Limitations in Private Title VII Actions.

This case raises an issue of fundamental importance to the administration of Title VII; namely, whether *private* Title VII actions are subject to any overall, conventional statute of limitations. This specific issue was expressly left open by the Supreme Court in the decision in *Occidental Life Ins. Co. v. EEOC* (1977), 432 U.S. 355, 368, when it stated "[u]nlike the typical litigant against whom a statute of limitations might appropriately run . . . ."

In this case, plaintiff did not sue until over five and one-half years after the alleged violation. Respondent Kirk could have requested a notice of right to sue from the EEOC and instituted this lawsuit at any time after 180 days after the filing of the charge with the EEOC. Kirk's failure to do so for over five and one-half years must result in the dismissal of his Title VII action.

This case is not unique. It is an excellent example of an acute danger to the continuing efficacy of Title VII and the federal courts. An enormous backlog of employment discrimination charges threatens to inundate the courts. Many of these charges are several years old—stale by any judicial standard applicable to any other federal cause of action. The following table graphically illustrates the problem:

EEOC CASES
1970—1977

Fiscal Year	Charges Received	Charges Resolved	Increase in Backlog	Cumulative Backlog
1970	14232	5967	8267	24509
1971	22920	11497	11423	35932
1972	33068	9802	23266	59198
1973	48735	20225	28510	87708
1974	54228	37537	16691	104399
1975	64542	62298	2224	106643
1976*	97764	82537	15227	121870
1977	79311	63847	15464	137336

*Fiscal Year 1976 was 15 months long, due to a change in the beginning and ending date of fiscal years.

II

The Absence of a Statute of Limitations Respecting Federal Court Actions Under Title VII Has Fostered and Encouraged the Inefficiency of the EEOC, Causing the Crisis in the Administration of Title VII.

In 1972, when Congress reviewed and overhauled the entire enforcement mechanism of Title VII, the dimensions of the EEOC's failure to perform the contemplated functions of investigation and conciliation was already manifest.

The provisions of Section 706(f)(1) requiring a notice of right to sue after 180 days—and the expansion of time for EEOC processing—were one response to this growing backlog.

Unfortunately, the tendency of courts to overlook the mandate that the EEOC "shall" notify a claimant of the right to sue after 180 days—and the absence of any other statute of limitations—has only served

to aggravate the immense and growing problem which Congress had attempted to alleviate in 1972.

By judicial interpretation, no real time limits have been established which force a prospective litigant to the choice of whether to sue in federal court. As a result, the EEOC has become a law enforcement agency unique in the annals of history. Without any time limits whatsoever, the EEOC has fallen into the trap of believing that it has unlimited resources with which to handle every claim as thoroughly and as completely as every other claim. In short, the EEOC has been seduced into believing that it need not exercise any sort of prosecutorial or administrative discretion in the processing of the EEOC's claims. Again, in the absence of time constraints, the agency has begun to believe that eventually it will have the opportunity, the energy, and the time to process each and every complaint which is left to slumber in its files.

The effect of this process is the precise opposite of the purpose of Congress when Title VII was adopted in 1964 and amended in 1972. The expectation was that the opportunity for conciliation would be limited, followed by a defined opportunity for the prospective litigant to make a timely choice of whether to pursue a judicial remedy in federal court.

The causal effect is natural and indisputable: first, the courts were reluctant to establish time limits on EEOC processes; second, the EEOC, like any human institution, avoided unnecessary choices and delayed action on all claims left to its jurisdiction; third, prospective claimants, uninformed as to their rights, unwilling to make the decisions which might foreclose options and opportunities failed to move in an expeditious

manner to bring their claims to the attention of federal courts. The inevitable result has been the inundation of federal courts with old claims, and a lengthy list of problems which should have been resolved expeditiously in the interest of preserving employment relationships and administering Title VII.

III

A Statute of Limitations Is Appropriate for All Private Civil Rights Actions, Including Those Brought Under Title VII.

The essential purpose of a statute of limitations is to cut off stale claims—claims which have not become the subject of a lawsuit within a specified time period. Accordingly, private Title VII claimants must not be permitted to bring actions after the passage of several years when the claim has become stale. If this situation continues to develop, great prejudice to defendants and enormous burdens on federal courts will be the inevitable result.

Periods of limitations have long been recognized as an essential part of our judicial system. Established precedents, sound principles of public policy and equity, and congressional intent in drafting the 1972 amendments to the Civil Rights Act of 1964 compel recognition and application of overall periods of limitations for *private* Title VII actions. Accordingly, the decision of the court of appeals must be reversed.

The necessity for having statutes of limitations to cut off stale claims has been recognized as an essential part of the jurisprudence of this nation since its founding. As recognized by Chief Justice John Marshall in *Adams v. Woods* (1805), 6 U.S. (2 Cranch) 336, 343:

> "[The absence of a period of limitations] would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."

More recently, in its decision in *Johnson v. Railway Express Agency, Inc.* (1975), 421 U.S. 454, the Supreme Court dealt specifically with the applicability of statutes of limitations to private civil rights actions. In holding that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law," (421 U.S. at 464) the Supreme Court dealt specifically with the purpose and function of statutes of limitations as restricting the overall period of time between the acts allegedly giving rise to a claim and the time when suit may be brought upon the claim. Thus, as stated by the majority of the Supreme Court in *Johnson v. Railway Express Agency, Inc.*:

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."
>
> 421 U.S. at 463-64.

And even the separate opinions of the Justices who dissented in part recognized the purpose and value of such an overall period of limitation:

> "Statutes of limitations are designed to insure fairness to defendants by preventing the revival of

> stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise."
>
> 421 U.S. at 473.

The reasons for a statute of limitations are equally applicable since Title VII simply represents an alternative federal approach in the civil rights area. The interests of society and of potential defendants in preventing the litigation of stale claims under Title VII is precisely identical to the interests of society and potential defendants in preventing the litigation of stale claims under Section 1981.

In *Johnson v. Railway Express Agency, Inc.*, this Court rejected the argument that the filing of an EEOC charge provides a respondent the same notice as the filing of a suit and therefore serves the same purpose as compliance with a period of limitations. Only where there had been (i) a prior "[judicial] filing," which (ii) had raised "exactly the same cause of action" is there proper notice of an actual attempt to invoke the authority of a federal court. 421 U.S. at 467. Obviously, when these two conditions are met, a respondent has not only been put on notice of the charges being made against him but also through discovery in the first action can take steps to secure and preserve for trial evidence favorable to his cause. Under such circumstances, the prior action does avoid the evil against which the statute of limitations was designed to protect. But no similar circumstances exist with regard to EEOC charges. The investigative nature of the EEOC's responsibility makes discovery of information from the charging party and preservation of testimony in an admissible form impossible. Thus, just

as the filing of a charge with the EEOC did not avoid the evils against which the statutes of limitations were designed to protect in a Section 1981 civil rights action, so the filing of the charge by appellant, or any other Title VII claimant, would not avoid the evils against which a period of limitations is designed to protect in a private Title VII action. In both cases, the evils are the same—"the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber"—and in both cases the overriding interest of the federal courts in avoiding these evils requires that any state statute of limitations be applied in such a way that it is not swallowed up and rendered useless by the state's tolling principles. Indeed, this overriding federal interest requires that *all* claims to be litigated in federal court, specifically including civil rights claims, be subject to some overall period of limitations to bar the prosecution of stale claims such as that presented for resolution here. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 462.

A. A Statute of Limitations Serves Not Only the Objectives of Fair Trial; It Would Also Facilitate Compliance With Title VII and Preservation of Employment Relationships.

As with all statutes of limitations, one interest of a potential defendant is the preservation of rights and evidence as a litigant. Indeed, the conventional justification for a statute of limitations remains applicable to civil rights cases. If claims are allowed to slumber, and the commencement of a lawsuit is delayed, both plaintiffs and defendants may often be denied the opportunity for fair trial. When witnesses become unavailable,

memories dim, and evidence is lost, all parties become subject to the vagaries of a judicial system which has been denied the basic means for making a rational decision.

However, the special character of Title VII cases involves another unique reason for expeditious resolution of claims.

Employment relationships are necessarily close. Careers are ongoing, organic and not easily remedied if interrupted for too long a time. When employees consider their options under Title VII, one option is always compromise and settlement. Frequently, compelling reasons exist for decisions to get on with the business of working and to seek conciliation and resolution of disputes more promptly than the EEOC. The absence of time limits, the delay of EEOC conciliation, and the delay of a lawsuit often postpone these choices and unnecessarily disrupt employment relationships which have not been severed, only strained. In other words, the necessity for speedy resolution of employment discrimination lawsuits inheres in the nature of the employment relationship. Virtually every unresolved dispute represents a misunderstanding, a festering wound, an unnecessary handicap on both employer and employee—a handicap which obstructs the employee from continuing with a career and the employer from taking care of business.

The long range interest of all employers is in the effective implementation of personnel policies which comply with Title VII. The prolongation of disputes arising from personnel policies, multiplied and aggravated by additional claims, serves only to cloud and obstruct the path toward compliance. The inability to

resolve these disputes not only diverts time, attention and emotional energy, it also prevents the acquisition of data necessary for compliance: the results and resolutions from which personnel policies can be scrutinized and adjusted.

The indisputable lesson of the congressional debates incident to the 1972 amendments to Title VII is that Congress desired quick resolution of employment discrimination claims. The national legislature understood that quick resolution of claims was in the interest of both employers and employees. That interest need not only be defined in terms of litigation. It is an interest which is related to the day-to-day operation of a business, the employment relationship, and the necessity for resolving the problems which often become more serious, a source of vexation and resentment with the passage of unnecessary time.

B. The Portions of Title VII Relied Upon by the Court of Appeals as Establishing a Statute of Limitations Do Not Perform the Essential Function of a Statute of Limitations: Foreclosing Litigation of Stale Claims.

The alleged internal Title VII statute of limitations—the 180/300-day period for filing a charge with the EEOC and the 90-day period to file suit after notice from the EEOC—meets none of these purposes, as this case so aptly demonstrates, since these periods do not either singly or jointly provide an overall period of limitations. Here, for example, no action was brought by Kirk until over five and one-half years after his allegedly discriminatory demotion, and the trial, if any, in this matter will not occur until more than eight or nine years thereafter. Surely, after such periods of time the defendant will be severely prejudiced

through the loss of evidence, the unavailability of witnesses, and the fading and distorting of memories. Indeed, as the Ninth Circuit recognized in a different context with regard to virtually identical delays in a private Title VII action:

> "[I]t cannot be presumed that appellee has not been prejudiced because of the delay. . . . Certainly, memories have dimmed and one of appellee's witnesses has died."
>
> *Cleveland v. Douglas Aircraft Company* (9th Cir. 1975), 509 F.2d 1027, 1030.

It is thus apparent that the portions of Title VII relied upon by the Court of Appeals serve neither to establish an overall period of limitations, nor to cut off stale claims. Therefore, they do not constitute a statute of limitations.

C. The Application of an Overall Period of Limitations Would Facilitate, Not Frustrate, Congressional Intent.

Dissatisfied with the way Title VII had been working, Congress in 1971 and 1972 undertook a review of Title VII as it had been enacted in 1964 and of alternative enforcement procedures. The whole thrust of the congressional debate with regard to the 1972 amendments was to insure the expeditious handling of Title VII claims in order to promote the interests of the public and protect the rights of both claimants and respondents. Thus, for example, Congressman Quie, the ranking minority member of the House Committee on Education and Labor, noted that virtually all members of the committee agreed on the need for giving enforcement powers to the EEOC:

> "[D]isagreement arose *only* as to which method of enforcement would be not only most effective

> but, *expeditious, fair and equitable as well.*" [Emphasis added]
>
> 1972 LEG. HIST. 200; House Debate, September 15, 1971.[1]

Similarly, Senator Dominick, who served as the principal senatorial spokesman concerning the meaning and merits of the court enforcement bill which was eventually enacted, explained during the floor debate:

> "I do not care who it may be, or how long they may have been claiming discrimination, *if they have to wait 20 months before they even find out whether or not the Commission feels that the charge is valid, all one can say is that justice delayed is justice denied.*" [Emphasis added]
>
> 1972 LEG. HIST. 677, Senate Debate, January 20, 1972.

In short, the thrust of the 1972 amendments was to insure more expeditious resolution of Title VII disputes. As Senator Dominick stated in favoring court litigation over cease and desist authority for the EEOC:

> "Although cease and desist promises much, a shiny new administrative procedure designed to redress grievances is no better than its performance, and *if it requires 2 to 3 years to achieve justice, its potential is nothing but a frustrating promise of what might have been.*" [Emphasis added]
>
> 1972 LEG. HIST. 795, Senate Debate, January 24, 1972.

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[1]The legislative history of the 1972 amendments has been compiled and published in *Senate Subcommittee On Labor Of The Committee On Labor And Public Welfare*, 92d Cong., 2d Sess., *Legislative History Of The Equal Employment Opportunity Act Of 1972* (Comm. Print 1972) [hereinafter cited as 1972 LEG. HIST.].

The Senator was not speaking of 2 to 3 years to compiete the EEOC's investigation as taking too long; but of *2 to 3 years to complete the total adjudication as being too long.*

Moreover, expeditious litigation was not sought only for the sake of the claimants. Congress fully recognized the interests of employers. Thus, Congressman Perkins, the ranking Representative to the joint Senate-House Conference Committee with regard to the 1972 amendments, explained the results of the conference as follows:

> "The conference resulted in legislation that will provide fair and effective enforcement of the equal employment provisions of the Civil Rights Act. The conference report provides a mechanism and a procedure that will, I am certain, prove to be both fair and effective, *one which will protect the rights of both the employer and the employee.*
>
> "The conferees spent considerable time dealing with the detailed provisions covering the procedure for filing and processing charges of discrimination brought by individuals who feel they have been unfairly treated because of their race or their sex. An effort was made to insure a 'speedy and an *equitable* resolution of such charges which *is in the interest* of both the employee and the *respondent employer or labor union.*' " [Emphasis added]
>
> 1972 LEG. HIST. 1855-56, House Debate, March 8, 1972.

Again and again in the preceding debates, the same point had been stressed. In the words of Senator Dominick:

> "This amendment *protects the rights* of both respondents and aggrieved *by providing* a fair, effective, and expeditious resolution of the dispute. . . . As I pointed out, effective protection of the *rights of* both the *employer* and the employee *demands a speedy resolution of the dispute.*" [Emphasis added]
>
> 1972 LEG. HIST. 695-96, Senate Debate, January 21, 1972.

Senator Fannin agreed:

> "In addition court enforcement offers a more expeditious settlement, and a *speedy resolution is vitally important* to both an aggrieved employee and *to a respondent employer.*" [Emphasis added]
>
> 1972 LEG. HIST. 699, Senate Debate, January 21, 1972.

These statements by those in the forefront of both the House and Senate debates over the 1972 amendments to the Civil Rights Act demonstrate the congressional desire for expeditious resolution of claims in order to insure fairness to both respondents and claimants. In light of this consistent desire, the application of an overall period of limitations would effectuate congressional intent. Indeed, congressional intent would be totally frustrated and offended by the open-ended enforcement proceedings which would permit an EEOC charge to lie dormant for four, five, ten, twenty or more years, only to erupt into federal court litigation at a time when memories have faded or become distorted, witnesses have become unavailable by death or otherwise, and fair trial has been rendered impossible. The policies of expeditious and fair resolution which were foremost in the minds of Congress require the

application of an overall period of limitation in order to effectuate these goals.

IV

Occidental Life Ins. Co. v. EEOC Established Only a Narrow Exception to the General Principle That a Conventional Statute of Limitations Is Applicable to All Federal Causes of Action.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC* (1977), 432 U.S. 355, held, *inter alia*, that (1) no limitation has been imposed upon the EEOC's failure to file suit in federal court, and that (2) EEOC enforcement actions are not subject to state statutes of limitations.

Occidental does not support the decision of the court of appeals for one very simple reason: *the holding applies only to cases in which the EEOC is plaintiff, and not to cases initiated by private litigants.* The Supreme Court held that although a congressional intent to apply a local limitations period has been reserved in instances where a federal statute creating a cause of action fails to specify such a period, state limitations periods will not be borrowed if their application would not comport with the federal statute's underlying policies.

In the instant case, the federal statute's underlying policies, as they pertain to this case, can be stated rather succinctly. The federal policy requires "employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court . . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. at 368. In other words, the EEOC is charged with investigating employment discrimination claims and settling them

by informal conciliation, if possible, and *it is required to refrain from suing until it has discharged its administrative responsibilities.* Since the EEOC is required to refrain from suing until it has discharged its administrative responsibilities, the Supreme Court held that the application of state statutes of limitations would not comport with the federal statute's underlying policies, since the state statute of limitations may very well have run before the administrative process has been completed.

However, private litigants in Title VII actions are not required to refrain from suing until the EEOC has discharged its administrative responsibilities. The private litigant is not charged with investigating employment discrimination claims and settling them by informal conciliation, if possible, as is the EEOC. This distinction is absolutely critical.

Any claimant must decide whether to pursue a judicial remedy or to rely on the administrative process. This was the result of the 1972 amendments to Title VII. If no limitations period is established, the claimant is never required to make any such choice until after the administrative process is completed—an increasingly long period of time. In short, application of a statute of limitations would be consistent with the need for expeditious processing of cases: it would avoid the interminable languishing of discrimination claims in the EEOC, while claimants delay making the decision contemplated by Section 706(f)(1) as amended in 1972.

This Court has already recognized the problem and drawn the distinction when it stated in *Occidental:*

> "Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC

is required by law to refrain from commencing a civil action until it has discharged its administrative duties."

Occidental Life Ins. Co. v. EEOC, 432 U.S. at 368.

The importance of the distinction between the EEOC and the private plaintiff was emphasized by this Court:

"If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she *may elect* to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court." [Emphasis added]

432 U.S. at 361.

This Court went on to state:

"The Committee Report clearly explained that the purpose of this provision was to afford an aggrieved person the *option* of withdrawing his case from the EEOC if he was dissatisfied with the rate at which his charge was being processed:

" 'In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted. This situation leads the committee to believe that the private right of action, both under the present Act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.' [Footnote omitted]

* * * *

"As in the House, both the original and substitute Senate bills authorized complainants dissatisfied with the pace of EEOC proceedings to bring individual lawsuits after 180 days. [Footnote omitted] And, as in the House, the Senate Committee explained that such a provision was necessary because the heavy caseload of the EEOC could result in delays unacceptable to aggrieved persons:

" 'As indicated in testimony, [the EEOC] caseload has increased at a rate which surpasses its own projections. The result has been increasing backlogs in making determinations, and the possibility of occasional hasty decisions, made under the press of time, which have unfairly prejudiced complaints. Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission.' " [Footnote omitted; emphasis added]

Occidental Life Ins. Co. v. EEOC, 432 U.S. at 362-63.

The very essence of, and reasons for, a period of limitations for private litigants, but not the EEOC, is best articulated by Judge Williams in *Clayton v. McDonnell Douglas Corp.* (C.D.Cal. 1976), 419 F. Supp. 28, 29:

"There could be sound reasons to free EEOC from limitation strictures of which a private plain-

tiff should not get the benefit. First, EEOC is a federal agency operating in all the states, and great confusion could come from subjecting its operations to the differing limitations statutes in the various states. Secondly, successful relief gained through litigation wherein the agency is plaintiff promotes public policy which benefits many citizens. Lastly, it may be a recognition of the troubles an agency with a small staff and a large backlog of cases has in processing complaints speedily.

"These are not factors which are relevant to a private party action and the law has always discouraged the filing of stale claims. Fairness dictates that an employer be told within a reasonable time after the act, that a disgruntled former employee is going to take him to court. Otherwise, if the worker is allowed to wait several years before he files his suit, the defendant might have lost contact with witnesses valuable to him, and pertinent personnel and other records in his possession may be destroyed. There is simply no valid reason for not requiring a private party to file his action within, say, a three year period."

V

Several Alternative Periods of Limitations Are Consistent With the Congressional Policy Embodied in Title VII.

A. Congress Intended to Require a Private Claimant to Choose Whether to Bring Suit Within a Period Which Cannot Be Greater Than 570 Days.

In 1972, when Congress reviewed Title VII, the entire enforcement procedures of Title VII were overhauled with new and more realistic time limits mandated

for each stage. The time within which to file charges was increased from 90/210 days to 180/300 days. The time period within which it was provided that the EEOC "shall" give notice to claimant was extended from a maximum of 60 days to 180 days. The time period within which to bring suit following notice from the EEOC was extended from 30 days to 90 days.

By extending the time within which the EEOC was to give notice to a claimant *and* by retaining the mandatory "shall", Congress manifested its intent that such period was to be mandatory. Otherwise, why would Congress extend the period? And why else would it use the word "shall" which was clearly understood by the leaders of the 1972 amendment debates as being mandatory?[2] Clearly these two factors alone compel the conclusion that Congress intended the 180-day period to be mandatory.

But these two factors are not the only guides to congressional intent. Congress demonstrated that it knew the difference between directory and mandatory periods when it added the following new sentence to Title VII:

> "The Commission shall make its determination on reasonable cause *as promptly as possible* and, *so far as practicable*, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge." [Emphasis added]
>
> Section 706(b), 42 U.S.C. §2000e-5(b).

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[2]See, e.g., the discussion between Senators Dominick and Javits on whether Title VII should say that the EEOC "shall" or "may" file suit after 30 days. 1972 LEG. HIST. 892-894.

Thus, when Congress intended only to give direction without mandate, it did so in unmistakable terms.

The conclusion that Congress intended the 180-day period to be mandatory is further strengthened by the final sentence of Section 706(f)(1) which provides that after suit has been filed:

> "Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or *further efforts of the Commission to obtain voluntary compliance.*" [Emphasis added]
>
> Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1).

Congress thus clearly anticipated that there would be instances when compliance had not been secured by the time suit would have had to be brought pursuant to the time limits specified in the Act. The solution in such cases was not, however, to delay the giving of notice and the bringing of the suit. Rather, the congressionally-prescribed solution was for suit to be brought in accordance with the time limits specified and then to seek a stay of further proceedings from the court, during which time the EEOC could complete its effort to obtain voluntary compliance. The importance which Congress attached to such expedition is further demonstrated by the fact that the stay to be granted by the court was to last no more than 60 days.

Thus, while congressional intent with regard to the 1964 Act may have been unclear, the congressional intent with regard to the Act as amended in 1972 is not.

Title VII as amended in 1972 should now be interpreted as requiring the filing of a charge within the 180/300 day-period, the giving of notice by the EEOC within 180 days if it has not instituted action itself or otherwise resolved the charge, and the filing of suit by a private claimant within an additional period of 90 days. Such an interpretation is not only consistent with the language and legislative history of the 1972 amendments, it is the only interpretation which is so consistent. Moreover, such an interpretation will insure that the interests of the complaining parties, respondents, and the public will be protected and promoted by putting an end to the interminable delays which to date have surely demonstrated the aptness of the maxim "justice delayed is justice denied."

As so interpreted, Title VII would actually provide a uniform, overall congressionally-mandated period of limitations as apparently sought by plaintiff and the EEOC. A maximum of 570 days (300 days plus 180 days plus 90 days) would thus be allowed between the time when the alleged acts of discrimination occurred and the date when a private suit with regard to such allegations would have to be brought. Plaintiff's present action, having been brought five and one-half years after his allegedly discriminatory demotion, would be time barred.

B. If Congress Has Not Provided a Statute of Limitations, the Most Analogous State Statute of Limitations Must Be Applied.

In the absence of an explicit federal statute of limitations, federal courts apply the most appropriate statute of limitations from the state in which the cause of action arose. In *Johnson v. Railway Express Agency*

(1975), 421 U.S. 454, the Court stated this principle of federal law:

> "Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981, the controlling period would ordinarily be the most appropriate one provided by state law. See *O'Sullivan v. Felix*, 233 U. S. 318 (1914) (Civil Rights Act of 1871); *Auto Workers v. Hoosier Corp.*, 383 U. S. 696, 701-704 (1966) (Labor Management Relations Act); *Cope v. Anderson*, 331 U. S. 461 (1947) (National Bank Act); *Chattanooga Foundry v. Atlanta*, 203 U. S. 390 (1906) (Sherman Act); *Campbell v. Haverhill*, 155 U. S. 610 (1895) (Patent Act)."
>
> 421 U.S. at 462.

C. Overriding Considerations of Federal Policy Preclude, in Any Event, the Operation of Any Tolling Principles Which Effectively Leave Private Title VII Actions Without Any Overall Period of Limitations.

If the applicable California statute of limitations were tolled during the entire and indefinite period when a claimant's charge is pending before the EEOC, the purpose of an overall period of limitations would be thwarted. If the EEOC did not issue a 90-day letter on its own, and if the claimant did not exercise his right to demand one, the charge could be pending before the EEOC almost indefinitely only to explode upon the courts and the respondent as a lawsuit at some distant time in the future. In such a situation, infinity plus 90 days would become the only period of "limitation" despite the "application" of the applicable state statute of limitations.

This result would be impermissible. "Considerations of state law may be displaced where their application would be inconsistent with federal policy . . . ." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 465. Here, just such an inconsistency would result if a state law tolling principle were applied in such a way as to totally eliminate any overall period of limitations.

Moreover, it is particularly important that the exception of tolling not be permitted to swallow the rule that there be an overall period of limitations, since the application of this rule is absolutely essential to effectuate the congressional mandate which requires that Title VII claims be resolved expeditiously in order to protect the interest of *claimants and respondents* and to ensure the fair and effective administration of justice which requires barring stale claims from the courts. No one would argue that it was Congress' intent to allow the prosecution of stale claims; yet that will be the precise result if the overall period of limitations is to be tolled.

Indeed, this Court expressly refused to make an exception to these important policies by refusing to toll the applicable period of limitations with regard to a civil rights claim under Section 1981 during the pendency of a similar charge before the EEOC. *Johnson v. Railway Express Agency, Inc., supra.*

Conclusion.

In effect, the Ninth Circuit has held that no conventional, overall statute of limitations applies to federal court actions under Title VII. This determination will frustrate the congressional intent that discrimination cases be processed expeditiously. If the general principle requiring application of a limitations period to all federal causes of action is to be ignored in Title VII cases, this Court should make that decision. A definitive resolution of this issue is of paramount importance to the administration of Title VII.

Petitioner respectfully submits that this Petition for Certiorari should be granted.

Dated: October 16, 1978.

Respectfully submitted,

STEPHEN E. TALLENT,
Attorney for Petitioner.

CHARLES E. HART 3d,
ROBERT N. KOHN,
DAVID J. SHAPIRO.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

David L. Kirk, Plaintiff-Appellant, vs. Rockwell International Corporation, Defendant-Appellee. No. 77-2640.

Filed: July 19, 1978.

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, District Judge.

Appellant, David L. Kirk, a white male, brought this action against his employer, Rockwell International Corporation (Rockwell) for the violation of his civil rights. Appellant asserts that Rockwell discriminated against him on account of his race in violation of Title VII of the Civil Rights Act of 1964[1] and the Civil Rights Act of 1866.[2] The District Court granted

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]42 U.S.C. §2000e et seq. (1970 and Supp. V). 42 U.S.C. §2000e-2 (1970) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

[2]42 U.S.C. §1981 (1970). Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . for the security of persons and property . . . as is enjoyed by white citizens . . ."

Rockwell's motion to dismiss the action on the ground that the claims were time-barred.

This appeal raises two issues: (1) whether a state statute of limitations applies to private actions under Title VII, and (2) whether *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), has retroactive application.

I) *Facts*

In his complaint, appellant alleges that in 1949 he was employed by Rockwell in California as a Radio and Radar Mechanic. Eventually, Rockwell promoted him to Material Review Engineer, but, in February, 1971, Rockwell demoted him to Inspector.

On or about April 27, 1971 appellant filed a charge with the Equal Employment Opportunity Commission (EEOC). He alleged that Rockwell, when it reduced its staff, systematically demoted whites on the basis of race,[3] and that appellant was a victim of this discriminatory employment practice.

The EEOC referred the charge to the California Fair Employment Practices Commission (FEPC). On about May 26, 1971, the FEPC declined to proceed, and the EEOC assumed jurisdiction of the charge.

On March 30, 1972 the EEOC sent a "Notice of Charge of Employment Discrimination" to Rockwell. Without disclosing appellant's name, the Notice informed Rockwell that it had been charged with discriminating against its employees on the basis of race in

[3]Appellant alleged in the charge:

"Under the specific circumstances now existing (the large reduction in the work force over an extended period of time) it is an extreme discrimination to remove long time qualified employees to replace them with 'minority' people who must be trained to qualify."

"wages, demotion, seniority, qualification/testing, benefits, terms and conditions." The Notice informed Rockwell of the date and place of the violation and included this statement:

> "No action on your part is necessary at this time . . . *Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.*" (emphasis added).

Beginning in 1971, appellant made many inquiries on the status of his charge against Rockwell. Not until August 5, 1976 did he learn that he could demand a "Right to Sue Letter" from the EEOC. On August 17, 1976 he received a "Right to Sue Letter" from the EEOC. This was more than 5 years after the date the charge was filed.

The letter notified appellant that the EEOC had not found reasonable cause to believe his charge of discrimination by Rockwell; but, if Kirk wanted to pursue the charge and bring an action against Rockwell, he would have to bring it within 90 days, or he would forfeit his Title VII claim.

Appellant then retained counsel and filed an action within 90 days after he received the letter. In his complaint appellant sought relief under Title VII, and, in a separate count, under 42 U.S.C. §1981.

Rockwell moved to dismiss the action for failure to state a claim. Rockwell argued that appellant's claims under Title VII and §1981 were barred by California's statute of limitations.

Rockwell asserts that the longest applicable California statute of limitations is 3 years and that appellant's action filed more than 5 years after the discrimina-

tory act is therefore barred. Rockwell relied on the rule that a federal cause of action for which Congress did not provide a period of limitations borrows the relevant state statute of limitations. E.g., *Runyon v. McCrary*, 427 U.S. 160, 179-181 (1976).

The District Court agreed with Rockwell and dismissed the action.

II) *The Title VII Period of Limitations*

Appellant contends that the filing and notice requirements of Title VII constitute a built-in period of limitations, so that it is unnecessary to borrow a state statute. Appellant also asserts that borrowing a state statute of limitations is inappropriate here because it would interfere with the federal policy, expressed in Title VII, of encouraging an aggrieved party to pursue administrative conciliation.

(A)

Title VII was enacted as part of the Civil Rights Act of 1964.[4] Title VII prohibited racial discrimination in employment and established procedures for enforcement of this prohibition.

As enacted, Title VII required an aggrieved party to file his charge of discrimination with the EEOC within 90 days of the discriminatory act.[5] The EEOC was required to notify the employer of the charge[6] and was also required to attempt to conciliate the

[4]Pub.L. No. 88-352, 78 Stat. 241.

[5]Section 706(d), 78 Stat. 260. If the aggrieved party first filed a charge with a state employment discrimination agency, he had to file his charge with the EEOC within 30 days of receipt of notice that the State agency had ended its proceedings, or within 210 days of the discriminatory act, whichever was earlier.

[6]Section 706(a), 78 Stat. 259.

grievance within 30 days.[7] The 30-day requirement was not mandatory; it was only directory. *Cunningham v. Litton Industries,* 413 F.2d 887, 890 (9th Cir. 1969).

If, after the 30 days, the EEOC determined that conciliation was unlikely, it was required to notify the aggrieved party. The aggrieved party then had 30 days to file an action.[8] However, the 30-day period did not begin to run until the aggrieved party received a "Right to Sue Letter", which informed him of his rights. *Cunningham v. Litton Industries, supra,* at 890-891.

(B)

The legislative history of the 1964 Act shows that the requirement of filing a charge within 90 days of the discriminatory act was intended to serve as a statute of limitations.

In 1964, the House Judiciary Committee favorably reported the bill[9] which became the Civil Rights Act of 1964. Section 707(d) of the bill provided:

> "No civil action (by an aggrieved party) shall be based on an unlawful employment practice occurring more than six months prior to the filing of the charge with the Commission and the giving of notice thereof to the respondent, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event a period of military service shall not be included in computing the six-month period."

[7]Section 706(e), 78 Stat. 260.

[8]*Id.*

[9]H.R. 7152, 88th Cong., 2nd Sess. (1964).

The bill also provided for a private action if the aggrieved party obtained permission from the EEOC, and required the EEOC to give notice of the charge to the employer.

The House approved the bill, and it was submitted to the Senate.

Senators Clark and Case, floor managers of Title VII of the bill, explained the filing requirement to the Senate:

> "The suit . . . would have to be based on an unlawful employment practice occurring within 6 months prior to the filing of the charge with the Commission . . . *This limitation will avoid the pressing of stale claims.*" 110 Cong. Rec. 7213 (1964) (emphasis added).

Senators Clark and Case then participated[10] in drafting the amended version of the bill, which required the aggrieved party to file his charge within 90 days of the discriminatory act, and to file his action within 30 days of notice from the EEOC.[11] Senator Humphrey, who also participated in the drafting of the final version of the Civil Rights Act of 1964, described the requirement that the charge be filed within 90 days of the discriminatory act as a "period of limitations." 110 Cong. Rec. 12723 (1964).

(C)

In 1972, Title VII was amended by the Equal Employment Opportunity Act of 1972.[12] Congress made the amendments apply to all charges, including charges which were pending before the EEOC on the effective

[10]110 Cong. Rec. 12707 (1964).

[11]110 Cong. Rec. 12813-12814 (1964).

[12]Pub.L. No. 92-261, 86 Stat. 103.

date, March 24, 1972, of the amendments. *See Inda v. United Air Lines,* 565 F.2d 554, 560 (9th Cir. 1977).

Unlike the 1964 Act, the amendments gave the EEOC the power to bring an enforcement action. The amendments also extended the time to file a charge of employment discrimination from 90 to 180 days,[13] and specified that the EEOC shall give notice of the charge to the employer within 10 days of the date the charge was filed.[14] The 1964 Act had not specified when the EEOC had to notify the employer.

Congressman Erlenborn, who sponsored the 1972 amendments in the House explained to his colleagues that the specific time limit was for the purpose of:

> ". . . giving notice to the party charged (so) that he would have an opportunity to gather and preserve the evidence . . ." 117 Cong. Rec. 31972 (1971).

In *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 335 (1977), the Supreme Court held that state statutes of limitations do not apply to EEOC enforcement actions. The Court permitted the EEOC to bring an action more than 3 years after receipt of the charge. The Court said that the initial filing requirement, and the requirement that the EEOC notify the employer of the charge, were intended by Congress to function as a statute of limitations.

[13]Section 706(e), 42 U.S.C. §2000e-5(e) (Supp. V 1975). If the aggrieved party first files his charge with an appropriate state agency, he has 300 days from the date of the discriminatory act, or 30 days from receiving notice that the state agency has terminated proceedings, whichever is earlier, to file his charge with the EEOC.

[14]*Id.*

"Congress did express concern for the need of time limitations in the fair operation of the Act, but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator . . ."

. . .

"The fact that the only statute of limitations discussions in Congress were directed to the period immediately preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure—a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." *Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 371-372.

Appellant filed his charge of discrimination with the EEOC months before the 1972 amendments became effective. Therefore, Rockwell did not receive notice of the charge for about 13 months after the discriminatory act. In urging the application of a state statute of limitations, Rockwell argued that "the charge could pend before the EEOC almost indefinitely only to explode upon . . . respondent as a lawsuit." Rockwell can hardly contend that here any California statute of limitations would have given it substantially sooner notice. The shortest arguably applicable California statute of limitations provides a 1-year period for bringing an action.

We conclude that Title VII does not borrow state statutes of limitations because the time limits for filing a charge and giving notice to the employer are a Congressionally established statute of limitations. *Accord, Draper v. United States Pipe & Foundry Co.,* 527 F.2d 515, 522 (6th Cir. 1975); *Roberts v. Western Airlines,* 425 F.Supp. 416, 420 (N.D.Cal. 1976). "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946); *United Mine Workers v. Kleppe,* 561 F.2d 1258, 1260-1261 (7th Cir. 1977).

(D)

In the 1972 Amendments, Congress directed the EEOC to complete its investigation of a charge within 120 days "so far as practicable."[15] In addition, Section 706(f)(1) of Title VII as amended in 1972 provides that the EEOC must notify the aggrieved party:

(1) if the EEOC dismisses the charge as unfounded, or

(2) if within 180 days the EEOC has not commenced an action, or

(3) if within 180 days the EEOC has been unable to complete a conciliation agreement.

The aggrieved party has 90 days after "such notice" within which to file an action.[16]

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[15]Section 706(b), 42 U.S.C. §2000e-5(b) (Supp.V 1975).

[16]Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (Supp.V 1975).

It may be that Congress designed Section 706(f)(1) to give additional protection to the employer by directing the EEOC to issue a "Right to Sue Letter" no later than 180 days after the charge was filed.[17] But the Courts have uniformly held that the 90-day period does not begin to run until the aggrieved party learns of his right to bring an action. *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286-1287 (9th Cir. 1977); *DeMatteis v. Kodak*, 520 F.2d 409, 410-411 (2nd Cir. 1974); *Garner v. E.I. Du Pont De Nemours & Co.*, 538 F.2d 611, 614-615 (4th Cir. 1976); *Zambuto v. American Telephone & Telegraph Co.*, 544 F.2d 1333, 1336 (5th Cir. 1977); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir. 1977).

These decisions reflect an awareness that:

> ". . . Title VII, as established by Congress, relies upon laymen, operating without legal assistance, to initiate both administrative complaints and lawsuits. Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims . . ." *Mahroom v. Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977).

It would be inconsistent with Title VII to hold that an aggrieved party who pursued his claim as diligently as appellant loses his right to file an action

[17]An EEOC regulation provides that if, after 180 days, the EEOC has not acted on a charge, the EEOC nevertheless will not issue a "Right to Sue Letter" unless the aggrieved party asks for one. 29 C.F.R. §1601.25b (1977).

because, unknown to him, the state statute of limitations had run.[18]

The judgment dismissing the Title VII claim is reversed.

III) *The Section 1981 Claim*

The District Court dismissed appellant's §1981 claim on the ground that it was barred by California's statute of limitations.

Appellant contends that the District Court erred in giving *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) retroactive effect. He argues that under the law before *Johnson*, the timely filing of a charge under Title VII with the EEOC tolled the state statute of limitations applicable to the §1981 claim based on the same facts. E.g., *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971).

In *Johnson*, the Supreme Court came to the opposite conclusion. It determined that Title VII and §1981 provide "separate, distinct, and independent" remedies for employment discrimination. 421 U.S. at 460. It concluded that an aggrieved party abandons his §1981 claim if he fails to file an action within the time set by the relevant state statute of limitations.

[18]"The Commission is expected, at the commencement and at other appropriate stages of the proceedings, to fully notify the aggrieved party in clear and understandable fashion of the various procedural rights and steps open to him. Too often a person files a charge but then blunders along, lost in the bureaucratic process." S.Rep. No. 92-415, 92nd Cong., 1st Sess. at 27 (1971).

In *Johnson*, the Court applied its ruling to the facts of that case, even though the ruling denied the petitioner any relief. Here, application of the rule announced in *Johnson* leaves appellant an alternative remedy under Title VII.

Generally a judicial decision which announces a new rule will not be applied retroactively unless retroactive application will promote the purpose of the rule and produce an equitable result. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971).

Under these criteria, the Fifth Circuit Court in a thorough and well reasoned opinion held that *Johnson* applies retroactively even though *Johnson* has overruled clear precedent. *Williams v. Phil Rich Fan Manufacturing Co.*, 552 F.2d 596 (5th Cir. 1977).

In this Circuit, there is no such precedent. We conclude that *Johnson* applies to appellant's case.

Appellant filed this action in which he asserted his §1981 claim more than 5 years after the discriminatory act. Under any applicable California statute of limitations,[19] his action is barred.

The District Court's dismissal of the Title VII claim is reversed, and the dismissal of the §1981 claim is affirmed.

REVERSED AND REMANDED

[19]Section 340(3) of the California Code of Civil Procedure provides a 1-year period of limitation for "injury to . . . one caused by the wrongful act of another . . ." Section 338(1) provides a 3-year period for "an action upon a liability created by statute, other than a penalty or forfeiture". This provision has been applied to employment discrimination actions under 42 U.S.C. §1983. E.g., *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir. 1978). Section 343 provides a 4-year period for all actions not governed by other statutes of limitations. See *Reed v. Hutto*, 486 F.2d 534, 537 n.2 (8th Cir. 1973) (analysis of law governing selection of appropriate state statute of limitations).

Kirk v. Rockwell International—No. 77-2640

HUFSTEDLER, Circuit Judge, concurring specially:

Although I agree with the result reached by the majority, I cannot concur with the reasoning. The majority opinion's discussion of *Johnson v. Railway Express Co.* (1975) 421 U.S. 454, assumes that judicial decisions announcing a new application of a statutory rule will not ordinarily be applied retroactively. That assumption is directly contrary to controlling authority. I strongly disagree with the majority's *dictum* to the effect that 42 U.S.C. § 2000e-5(f)(1) may require the EEOC to issue right-to-sue letters within 180 days of the filing of a complaint. That *dictum* is in conflict with controlling authority and the *dictum* is also in conflict with the statutory scheme for reasons that I hereafter describe. Finally, I express my views on the application of state statutes of limitations to Title VII because the existing law needs clarification that is not supplied by the majority opinion.

Kirk is a white man who seeks to sue his employer, Rockwell International Corporation (Rockwell), for alleged racial discrimination in demoting him from a professional to a non-professional job rank in February, 1971. The essence of Kirk's claim is that Rockwell systematically disadvantaged whites in order to favor minorities when it reduced personnel in 1971. Kirk timely filed a complaint of discrimination with the federal Equal Employment Opportunity Commission (EEOC),[2] which first referred the matter to the Cali-

[2]Under the version of Title VII then in effect, Kirk was required to file a complaint with the EEOC within 90 days of the alleged discrimination. He filed on April 27, 1971, approximately 70 days after the act of February 17, 1971, he challenges.

fornia Fair Employment Practices Commission and then assumed jurisdiction on May 26, 1971, when it failed to act. Notice of the charge was given to Rockwell on March 30, 1972, by the EEOC, in compliance with recently enacted amendments to Title VII.[3] Despite frequent inquiries by Kirk, no further action was taken by the EEOC until August, 1976.[4] Kirk then first learned that he could demand a "right to sue" letter and did so, receiving the letter on August 17, 1976, with its notification that the EEOC had not found reasonable cause to believe his charge was true, but informing him that he could bring a civil action within 90 days of its receipt. Kirk thereupon hired counsel[5] who brought this action within the 90-day period, on

[3]The 1972 amendments to Title VII require that notice to the employer be given within 10 days of the filing of the complaint by the aggrieved individual. (42 U.S.C. § 2000e-5(b) (1972). *See* Occidental Life Ins. Co. v. EEOC, *supra,* 432 U.S. at 371-72 & n.30.) The requirement was made retroactive to pending cases, and they were deemed filed in accordance with the 1972 provisions. (Int'l. Union of Elect., Radio & Machine Workers, Local 790 v. Robbins & Meyers, Inc. (1976) 429 U.S. 229, 241-44; *see also* Davis v. Valley Dist. Co. (9th Cir. 1975) 522 F.2d 827, 830-32.) Thus, while actual notice to Rockwell came over one year after the alleged discrimination, we treat the case as if the notice issued within 10 days of the filing of Kirk's complaint as is now mandated by Title VII. Under the prior version of the statute, the EEOC was required to give the employer a copy of the charge but no time period was specified. (*See* 42 U.S.C. § 2000e-5(a) (1970) (amended 1972).)

[4]Rockwell concedes that Kirk complied in all respects with Title VII's provisions and diligently attempted to obtain prompt EEOC action on his complaint.

[5]Prior to this time Kirk, a non-lawyer, represented himself and received no legal advice. He was unaware that he could demand a right to sue letter before August, 1976. (*See* Mahroom v. Hook (9th Cir. 1977) 563 F.2d 1369, 1375 ("Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims.").)

November 8, 1976, suing both under Title VII and under 42 U.S.C. § 1981. The district court granted Rockwell's motion to dismiss the complaint on the ground that California statutes of limitation applied to bar both claims due to the five and one-half-year hiatus between Kirk's demotion and the filing of the action. (*Kirk v. Rockwell International Corp.* (C.D. Cal. 1977) 432 F. Supp. 627, 628-29.)

I

Johnson v. Railway Express Agency, supra, held that state statutes of limitation would be "borrowed" to fill the limitation gap left in Section 1981. (421 U.S. at 462. *See Runyon v. McCrary* (1976) 427 U.S. 160, 179-82; *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 101-05; *Holmberg v. Armbrecht* (1946) 327 U.S. 392, 395; *International Union of Operating Engineers v. Fischbach & Moore, Inc.* (9th 1965) 350 F.2d 936, 938-39; *Horn v. Bailie* (9th Cir. 1962) 309 F.2d 167, 168; *Smith v. Cremins* (9th Cir. 1962) 308 F.2d 187, 188-90 & nn. 9, 12. *See generally* Note, Federal Statutes Without Limitation Periods, 53 Colum. L. Rev. 68 (1953).) *Johnson* also held that Section 1981 was a remedial alternative to Title VII and that filing a complaint with the EEOC under Title VII did not toll limitations applicable to a Section 1981 action. (421 U.S. at 459-61, 465-66.)

If *Johnson* applies to Kirk's case, his Section 1981 action is barred under any applicable California limitations statute because more than five years elapsed after the alleged discriminatory acts.[6] He argues that

[6]The longest period potentially applicable to 42 U.S.C. 1981 actions is three years. (Cal. Code Civ. Proc. § 338(1) (actions

(This footnote is continued on next page)

the applicable California limitations period should be deemed to run only from the date *Johnson* came down and that this action is timely as filed within one year of that date.

None of the exceptions to the general rule that judicial decisions are both retrospective and prospective is applicable here. (*See, e.g., Linkletter v. Walker* (1965) 381 U.S. 618, 622-29; *National Ass'n of Broadcasters v. FCC* (D.C. Cir. 1976) 553 F.2d 1118, 1130-32; *United States v. Fitzgerald* (7th Cir. 1976) 545 F.2d 578, 581-82; *People v. The Italian Motorship Ilice* (9th Cir. 1976) 534 F.2d 836, 840-41 n.1.) Both intervening decisions and statutory changes will be applied to all cases *sub judice* "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (*Bradley v. School Board of the City of Richmond* (1974) 416 U.S. 696, 710-21. *Accord J.A. Jones Construction Co. v. Plumbers and Pipefitters Local* 598 (9th Cir. 1978) 568 F.2d 1292, 1295; *Wasserman v. Municipal Court of Alhambra Judicial District* (9th Cir. 1976) 543 F.2d 723.) Nothing in *Johnson* suggests that the Court limited the application of its decision. Other Circuits have routinely applied *Johnson* to bar actions which arose prior to it. (*Martin v. Georgia-Pacific*

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for liability created by statute).) We have no occasion to decide whether a shorter, one-year statute of limitations might apply (*id.* § 340(3) (tort actions)) because the delay here was five and one-half years. (*But see* Shouse v. Pierce County (9th Cir. 1977) 559 F.2d 1142, 1146-47 ("the state limitations statute that we have repeatedly borrowed [in civil rights actions] is a statute that prescribes the limitations for actions founded on a liability created by statute."); *see also* Bradshaw v. Zoological Soc. of San Diego (9th Cir. 1978) ..... F.2d ..... [slip op'n at 385]; Briley v. California (9th Cir. 1977) 564 F.2d 849, 854, both noting § 338(1) applies in § 1983 actions.

Corp. (8th Cir. 1977) 568 F.2d 58; *Graffals Gonzalez v. Garcia Santiago* (1st Cir. 1977) 550 F.2d 687, 688; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 275; *Fine v. City of New York* (2d Cir. 1975) 529 F.2d 70, 76-77.)

Kirk argues that his case falls within the limited set of circumstances in which a decision should not be given retrospective application because it is a radical departure from prior law and falls inequitably upon parties who relied upon the old rule. (*E.g., Chevron Oil Co. v. Huson, supra,* 404 U.S. at 105-15. *Cipriano v. City of Houma* (1969) 395 U.S. 701, 706; *Bunker v. Wise* (9th Cir. 1977) 550 F.2d 1155, 1156-58.) *Johnson* does not fall within the rationale of *Chevron Oil Co. v. Huson, supra.* Although courts in the Fifth and District of Columbia Circuits had held prior to *Johnson* that filing with the EEOC under Title VII tolled the Section 1981 statute of limitations (*see* 421 U.S. at 457 & n.4), that rule was never adopted by this Circuit. Rather, we have long adopted state statutes of limitation in civil rights case. (*See, e.g., Smith v. Cremins, supra;* cases cited in n.6, *supra.*) A litigant might have hoped that this court would follow the Fifth and District of Columbia Circuits in tolling the state statute of limitation in Section 1981 actions, but he could not have relied upon those cases as dispositive here. Moreover, the Fifth Circuit itself has held that litigants in its courts could not be shielded from the ordinary jurisprudential effect of *Johnson* because of its former rule to the contrary. (*Williams v. Phil Rich Fan Manufacturing Co.* (5th Cir. 1977) 552 F.2d 596, 598-600.) I agree with the Fifth Circuit that the *Johnson* decision should not be given limited applicability.

II

Private individuals aggrieved by employer practices may bring a civil action to enforce these rights under Title VII, if they comply with certain statutory requisites. They must first file a complaint with the EEOC within 180 days of the alleged discrimination (42 U.S.C. § 2000e-5(e)) and the EEOC must thereupon notify the employer within 10 days and conduct an investigation of the charge. (*Id.* § 2000e-5(b).) Longer periods for filing the complaint—up to 300 days—are available to employees who live in states which have statutes comparable to Title VII, because the statute requires the EEOC to defer acquiring jurisdiction until the state is given the initial opportunity to act. (*Id.* § 2000e-5(c)-(e).) Once the EEOC has assumed jurisdiction of the controversy, the individual's ability to act is suspended to avoid duplication of proceedings. (*See H.R. Rep. No. 92-238,* 92d Cong., 1st Sess. reprinted in 1971 U.S. Code Cong. & Admin. News 2137, 2148 (hereinafter cited as "*Committee Report*").) The EEOC may dismiss the charge, as it did here, "because there is not reasonable cause to believe that the charge is true" (42 U.S.C. § 2000e-5(b)) or, if it finds to the contrary, it may attempt to attain conciliation and settlement through administrative channels or seek to enforce Title VII in the courts. (*Id.* § 2000e-5(b), (f), (g), & (j). *See Occidental Life Insurance Co. of California v. EEOC* (1977) 432 U.S. 355, 358-66.) If the EEOC is unable or unwilling to resolve the controversy and if no action has occurred after 180 days and the complainant wishes to withdraw the matter from EEOC jurisdiction, the EEOC issues a so-called "right to sue letter." Issuance of this letter terminates EEOC jurisdiction and its

ability to act and "reactivates" the individual's right to bring a civil action under Title VII. (*Committee Report, supra,* 1971 U.S. Code Cong. & Admin. News at 2148.) If the individual does not file suit within 90 days, however, the right is extinguished. (*International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Meyers, Inc.* (1976) 429 U.S. 229, 240; *Lynn v. Western Gillette, Inc.* (9th Cir. 1977) 564 F.2d 1282; *Mahroom v. Hook* (9th Cir. 1977) 563 F.2d 1369, 1374-75.)

A private individual's civil action under Title VII thus requires the timely filing of the complaint with the EEOC and the filing of a civil action in the federal district court within 90 days of notification of the termination of EEOC proceedings through receipt of a right to sue letter. (*See id.* (90-day period commences on date of actual receipt of the letter).) In the interim, the matter is committed to the EEOC for administrative processing, and the Supreme Court in *Occidental Life Insurance Co., supra,* affirmed this court's holding that such processing was subject to no time limitations. (432 U.S. at 372-73, *aff'ing* 535 F.2d at 536-40.)

Rockwell contends that any statute which gives a private individual a right to sue another must contain an absolute time limitation period, running from the date of the accrual of the cause of action to the date of the filing of the complaint in court. As Title VII contains no such overall time limitation, it says that a limitation period must be borrowed from state law to fill the "gap" as in *Johnson v. Railway Express Co., supra,* 421 U.S. at 462-64. (*See also* cases cited in Section I p. 3, *supra.*) Absent such a limitation

period, it argues, defendants will be subject to undue burdens in defending stale claims. Kirk and the EEOC as *amicus curiae* argue to the contrary that state limitations periods have no role to play because Title VII contains a complete set of limitations periods. Alternatively, they argue that if such statutes do apply, they should be deemed tolled during the pendency of EEOC administrative proceedings.

The question presented was explicitly left open in this court's decision in *Occidental Life Insurance, supra,* 535 F.2d at 537 n.6, and the district courts of this Circuit have divided on its resolution. (*Compare Piva v. Xerox Corp.* (N.D. Cal. 1974) 376 F. Supp. 242, 244-45 (state statutes of limitation do not apply) *with* this case below, 432 F. Supp. 627, 628-29; *Jarrett v. North American Rockwell Corp., Los Angeles Div.* (C.D. Cal. 1977) 433 F. Supp. 275, 276-77; *Clayton v. McDonnell Douglas Corp.* (C.D. Cal. 1976) 419 F. Supp. 28, 29-30 (state statutes of limitation do apply).) One circuit court has decided the issue—the Sixth Circuit in *Draper v. United States Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 522. The *Draper* court stated simply that "Title VII establishes its own statute of limitations, and state law is irrelevant in determining whether a private litigant has lost his right of action under Title VII through the passage of time." (*Id.*) It relied, *inter alia,* upon the decision of the district court for the Northern District of California in *Piva v. Xerox Corp., supra.*

District courts outside this Circuit have uniformly held that state statutes of limitation do not bar private litigants' Title VII actions which otherwise comply with its filing provisions. (*Pierce v. Catalytic, Inc.* (E.D. Pa. 1977) 430 F. Supp. 1180, 1183; *Askins v. Imperial*

Reading Corp. (W.D. Va. 1976) 420 F. Supp. 413, 416; *Allen v. Amalgamated Transit Union, Local 788* (E.D. Mo. 1976) 415 F. Supp. 662, 666-67 (*semble*); *Pittman v. Anaconda Wire & Cable Co.* (E.D. N.C. 1976) 408 F. Supp. 286, 293; *Beckum v. Tennessee Hotel* (W.D. Tenn. 1971) 341 F. Supp. 991, 994; *Jackson v. Cutter Laboratories* (E.D. Tenn. 1970) 338 F. Supp. 882, 885.)

I agree with the Sixth Circuit and the district courts which have held that Title VII's time provisions fully define the steps which must be taken by a Title VII litigant to preserve his or her right to sue. State statutes of limitation are not borrowed because there is no gap to fill and applying them to private individuals would interfere with the effective administration of Title VII for reasons stated in *Occidental Life Insurance, supra.*

In *Occidental Life Insurance Co. v. EEOC, supra,* the Supreme Court held that the requirements that an employee file a complaint with the EEOC within a limited period of time and that the EEOC then notify the employer of the charge were "the benchmark, for purposes of a statute of limitation." (432 U.S. at 371-72.) Once these steps have been taken, Title VII imposes no limitation on the amount of time elapsing between the EEOC's assumption of jurisdiction and the filing by the EEOC of a judicial enforcement action. (*Id.* at 372.) Although this means that "the EEOC is not bound by any limitations period at all" (*id.* at 373 (Rehnquist, J., *dissenting*)), the Court declined to borrow state statutes of limitations.

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State

> legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' *Johnson v. Railway Express Agency*, 421 U.S. 454, 465. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." 432 U.S. at 367.

The Court concluded that application of state law would frustrate the federal scheme. The Court read the legislative history of the 1972 amendments to Title VII as reflecting congressional awareness of the lengthy delays involved in EEOC proceedings and concluded that Congress had made a positive decision to permit such delay in the interest of obtaining the other economies which could be achieved by using this method of dispute resolution—reduced litigation costs, conservation of scarce judicial resources, and the establishment of national standards for employer practices. (*Id.* at 369-71. *See Committee Report, supra,* 1971 U.S. Code Cong. & Admin. News at 2146-47.[7])

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[7]"Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases. * * * The sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditures of judicial resources in already overburdened Federal district courts. * * * Moreover, administrative tribunals are less subject to technical rules governing such matters as pleadings and motion practice—which afford opportunities for dilatory tactics—and are less constrained by formal rules of evidence—which give rise to a lengthier (and more costly) process of proof." (*Id.* at 2146.)

In *Occidental*, the Court also examined the meaning of 42 U.S.C. §2000e-5(f)(1) which provides in pertinent part:

> ". . . if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference . . . , whichever is later, the Commission has not filed a civil action under this section . . . [nor] entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved [and issue a right to sue letter]."

Although the statute appears to mandate that the EEOC divest itself of jurisdiction, the Court agreed with the circuit courts which had concluded that the provision merely entitled the complainant to withdraw the charge from EEOC jurisdiction if he or she wished to pursue a civil action rather than await the outcome of EEOC proceedings. (432 U.S. at 360-66 & n.21. *Accord EEOC v. Wilson & Co.* (10th Cir. 1976) 535 F.2d 1213, 1215; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 487; *Tuft v. McDonnell Douglas Corp.* (8th Cir. 1975) 517 F.2d 1301, 1305-07; *EEOC v. Kimberly-Clark Corp.* (6th Cir. 1975) 511 F.2d 1352; *EEOC v. Louisville & Nashville RR. Co.* (5th Cir. 1974) 505 F.2d 610; *EEOC v. Cleveland Mills Co.* (4th Cir 1974) 502 F.2d 153.)

The same courts have concluded that this provision merely gives the complainant the option of extricating the charge from the "administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process" (*Committee Report, supra,*

1971 U.S. Code Cong. & Admin. News at 2147-48; noting delays of 2-3 years), but it does not require that the complainant do so. (*E.g., Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 362-66; *Tuft v. McDonnell Douglas Corp., supra,* 517 F.2d at 1305-08.) This court and others have also rejected the argument that this 180-day period combined with the pre- and post-filing time periods comprises an overall limitation period on a private individual's civil action under Title VII. (*Cunningham v. Litton Industries* (9th Cir. 1969) 413 F.2d 887. *Accord Miller v. International Paper Co.* (5th Cir. 1969) 408 F.2d 283, 285-87; *Choate v. Caterpillar Tractor Co.* (7th Cir. 1968) 402 F.2d 357, 361.) We stated in *Cunningham* that "the . . . period within which suit may be filed in federal district court begins to run when the aggrieved party receives notice . . . from the EEOC, regardless of the period of time the Commission has taken to process the charge." (413 F.2d at 890.)

If Rockwell were right, a complainant would be forced to demand a right to sue letter and to abandon EEOC jurisdiction to avoid destruction of the complainant's right to a civil action whenever a state limitations statute threatened to expire. That interpretation would frustrate the congressional scheme of Title VII. Congress established a carefully integrated set of time periods keyed to the procedural steps of the statute. (*See Machlin v. Spector Freight Systems, Inc.* (D.C. Cir. 1973) 478 F.2d 979, 986 (the Act "embodies a clearly defined federal policy of deferring action in federal court until a charge has been filed with the agency and an opportunity afforded . . . to attempt private settlement." Therefore EEOC "clearance" is necessary before a private party can file suit).)[8] As *Johnson v. Railway Express Agency, supra,* explains, Congress intended to offer an aggrieved employee a variety of remedies short of litigation, with resort to judicial process only when these alternative remedies had failed. Interruption of EEOC jurisdiction to comply with state statutes of limitation is inconsistent with the congressional scheme.[9] As the Court pointed out in *Holmberg v. Armbrecht, supra,* 327 U.S. at 395: "[When] Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The congressional statute of limitations is definitive."[10]

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[8]As the completion of administrative proceedings are a jurisdictional requisite to the existence of the individual's right to sue, it would appear that any state limitation period would be tolled during the pendency of EEOC proceedings in any event. (*Cf.* Chambers v. Omaha Public School District (8th Cir. 1976) 536 F.2d 222, 230-31.) In view of our holding here, we have no need to decide this issue.

[9]The suggestion that a precautionary suit be filed and then delayed pending EEOC deliberations as the Court suggested in Johnson v. Railway Express, supra, 421 U.S. at 465, is untenable. There is no right to sue and hence no cause of action under Title VII until Title VII proceedings are over. Thus no civil action may be filed unless EEOC jurisdiction ceases and the accommodation suggested in *Johnson* is not available. Moreover, if it were, it would involve the already overburdened district courts in untold nuisance and confusion to attain an end adequately served by Title VII's own requirement of prompt notice to the employer and undercut a major purpose of the creation of the EEOC—to free the courts of the need for adjudication of these claims by resolving most through an administrative process.

[10]*See also* Occidental Life Ins. Co. v. EEOC, *supra,* 432 U.S. at 381 n.5. In dissenting, Mr. Justice Rehnquist suggested that the 90-day period was a form of limitations period applying only to individual actions and thus concluded that the absence of such a provision as to EEOC enforcement actions suggested a gap existed which should be filled by a state statute of limitations. To the same effect is EEOC v. Kimberly-Clark Corp. (6th Cir. 1975) 511 F.2d 1352, 1357.

Contrary to Rockwell's argument, our interpretation of Title VII does not thwart state policy against the prosecution of stale claims and the use of stale evidence. Title VII requires timely filing and notice before the institution of administrative proceedings. (*Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 371-72 & n.30.) After an employer is notified that it is the subject of an EEOC investigation, the employer knows that the claim is alive and ample opportunity exists to preserve evidence, to conduct its own investigation, and to prepare itself for potential litigation.[11] The state's interest in prompt resolution of employer-employee conflicts involving discrimination is adequately served under Title VII by the deferral provisions, permitting the *locus in quo* to try to resolve the controversy before EEOC jurisdiction is assumed.[12]

Title VII adequately accommodates the competing interests of the employer and employee. The employer receives prompt notice of the pendency of a Title VII charge and is assured that if the EEOC decides not to act, the employee must sue promptly or be barred from recovery. The employee is given the opportunity to have the charge resolved administratively, but also

[11]*See also* EEOC v. Occidental Life Ins. Co., *supra,* 535 F.2d at 540; Cunningham v. Litton Industries, *supra,* 413 F.2d at 891, both suggesting that in certain circumstances the employer might be able to precipitate adjudication.

[12]42 U.S.C. § 2000e-5(c)-(e). *See* Davis v. Valley Distributing Co. (9th Cir. 1975) 522 F.2d 827, 832 n.12 ("this deference . . . is to take the form of an *opportunity* to act;" compliance with state deadlines is not a precondition to EEOC jurisdiction or later civil suit.) *Accord* Olson v. Rembrandt Printing Co. (8th Cir. 1975) 511 F.2d 1228, 1232 ("state limitations period cannot govern the efficacy of the federal right"). *See also* Chambers v. Omaha Public School Dist. (8th Cir. 1976) 536 F.2d 222. Thus in deference to California law, its Fair Employment Practices Commission was given the first opportunity to act in this case.

obtains a right to sue if the EEOC is unable or unwilling to resolve the problem. If any abuses do occur, the court in exercise of its equitable powers may restrict the granting of relief. (432 U.S. at 373. *See also EEOC v. South Carolina Nat'l Bank* (4th Cir. 1977) 562 F.2d 329, 333.) No delay attributable to Kirk is present in this case, and he is entitled to adjudicate his Title VII claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THE VIEWS HEREIN EXPRESSED.

APPENDIX B.

David L. Kirk, Plaintiff, v. Rockwell International Corporation, Defendant. No. 76-3510-AAH.

United States District Court, C. D. California. June 3, 1977.

Employee brought civil rights action against employer alleging discrimination on the basis of his race, and employer moved to dismiss. The District Court, Hauk, J., held that federal civil rights action which was instituted approximately five years and nine months from date of alleged discrimination was time barred under either California's one year statute of limitations applicable to tort liability or California's three-year statute of limitations applicable to actions based upon a liability created by statute.

Motion to dismiss granted.

Charles E. Hart, 3d, Robert N. Kohn by David J. Shapiro, El Segundo, Cal., for defendant Rockwell Intern. Corp.

Silver & Wells by Stephen H. Silver, Los Angeles, Cal., for plaintiff David L. Kirk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAUK, District Judge.

The above-entitled matter having come on to be heard on Defendant Rockwell International Corporation's (hereafter "Rockwell") Motion to Dismiss plaintiff's cause of action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, on April 4, 1977, before the Honorable A. Andrew Hauk, United States District

Judge, the Court having considered all the documents filed with respect to said Motion, the pleadings, memoranda, and having heard and considered the arguments of counsel; and the Court being fully advised in the premises, now makes the Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is a Caucasian male employee of Rockwell. Plaintiff was initially hired by Rockwell on or about April 12, 1949, at its Autonetics Division in Anaheim, California, and is currently employed at Rockwell's Autonetics Division in Anaheim, California.

2. Prior to February 14, 1971, plaintiff was employed in a salaried position as a Member, Quality and Reliability Staff II. Subsequent to February 14, 1971, plaintiff had been employed in a nonsalaried position as Inspector-Material Review, Senior.

3. In the immediate time frame of February 14, 1971, the number of salaried employees in the position of Member, Quality and Reliability Staff II was reduced for reasons necessitated by business and economic conditions.

4. On or about April 27, 1971, plaintiff filed a charge of alleged discrimination against Rockwell with the Equal Employment Opportunity Commission (hereafter "EEOC"). The charge alleged discrimination on the basis of his race, Caucasian. Plaintiff had also filed a charge with the Fair Employment Practice Commission (hereafter "FEPC") of the State of California. On or about May 26, 1971, the FEPC declined to proceed in the matter, at which time the EEOC assumed

jurisdiction. On or about August 17, 1976, the EEOC issued a Letter of Determination to the plaintiff indicating that it had not found reasonable cause to believe that the charge of employment discrimination was true, and that it was terminating its processes.

5. On November 8, 1976, plaintiff's counsel filed this cause of action with this Court pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§2200 *et seq.*) (hereafter "Title VII") and 42 U.S. C.A. § 1981.

6. On December 13, 1976, defendant filed with this Court a Motion to Dismiss plaintiff's cause of action on the basis that this Court lacked subject matter jurisdiction and that plaintiff's cause of action failed to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. On March 25, 1977, plaintiff filed with this Court Points and Authorities in opposition to defendant's Motion to Dismiss. On March 31, 1977, defendant filed with this Court a Response to plaintiff's Points and Authorities and affidavit opposing defendant's Motion to Dismiss. On April 1, 1977, plaintiff filed with this Court a Reply Memorandum and an affidavit of plaintiff's counsel opposing defendant's Motion to Dismiss.

7. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Defendant Rockwell is an employer within the meaning of Sections 701(b) and 703(a) of Title VII (42 U.S.C.A. §§ 2000e and 2000e-2).

2. In private civil rights actions, where Congress has not provided a statute of limitations, the most analogous state statute of limitations will be applied to the federal action. *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533 (1976), cert. granted, 429 U.S. 1022, 97 S.Ct. 638, 50 L.Ed.2d 623, 1976. See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

3. Congress has not provided an overall period of limitations for Title VII actions and § 1981 actions. Therefore, the most applicable state statute of limitations must apply.

4. The most analogous California state statute of limitations is either the one-year statute of limitations with regard to tort liability (prescribed in § 340(3) of the California Code of Civil Procedure (hereafter "CCP")), or the three-year statute of limitations with regard to actions upon a liability created by statute (prescribed in CCP § 338(1)).

5. Inasmuch as this cause of action was instituted approximately five years and nine months from the alleged date of discrimination, this Court need not determine whether the applicable state statute of limitations with regard to such actions is that prescribed in CCP § 340(3) or CCP § 338(1), as this case is time-barred in any event. *Clayton v. McDonnell Douglas Corp.*, 419 F.Supp. 28 (C.D. Cal. 1976), on appeal, No. 76-3198 (C.A. 9 1977).

6. The applicable state statute of limitations is not tolled merely because the plaintiff filed a charge with the EEOC, since, *inter alia*, such tolling principle would totally eliminate any overall period of limitations in

such cases. *Johnson, supra*; 421 U.S. pp. 455, 456, 95 S.Ct. 1716.

7. For the foregoing reasons, this Court lacks subject matter jurisdiction, and the plaintiff has failed to state a claim upon which relief can be granted. Accordingly, this case is dismissed for the reason that it was not timely instituted and is now time-barred by any applicable California state statute of limitations.

8. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

FILED
NOV 14 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-643

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

vs.

DAVID L. KIRK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1978
No. _____

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

vs.

DAVID L. KIRK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

1. Is any state statute of limitations applicable to a proceeding instituted by a private litigant according to the express provisions of and within the prescribed time limitations set forth in 42 U.S.C. §2000e (Title VII), or does Title VII itself set forth the only jurisdictional requirements for such a proceeding?

2. If the most analogous state statute of limitations is applicable to a Title VII claim by

a private litigant, is that period tolled during the pendency of the EEOC proceeding as a matter of (1) federal law or (2) state law?

STATUTE INVOLVED

This matter involves 42 U.S.C. §2000e (Title VII) and in particular 42 U.S.C. §2000e-5(e) [§706(e)] and (f)(1) [§706(f)(1)] which provide in pertinent part as follows:

> "(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, ...
>
> "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision

> named in the charge. * * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . ."

STATEMENT OF THE CASE

Prior to filing the present suit, on or about April 27, 1971, respondent timely filed with the Equal Employment Opportunity Commission (EEOC) a CHARGE OF DISCRIMINATION as required by Title VII [see, 42 U.S.C. §2000e-5(e)], against petitioner. The charge of employment discrimination alleged that on February 15, 1971, respondent had been reduced from the position of Material Review Engineer to the lower position of Material Review Inspector because of his Caucasian race.

On or about May 6, 1971, respondent received notice from the EEOC that it had referred his charge to the California Fair Employment Practice Commission (FEPC) for its investigation, pursuant

to §706(b) of Title VII. On or about May 26, 1971, the FEPC declined to proceed in the matter, at which time the EEOC assumed jurisdiction.

Commencing on or about December 20, 1971, and continuing to July 26, 1976, respondent made numerous inquiries with the offices of the EEOC, his United States Congressman, United States Senator (Cranston), and the President of the United States, requesting each of them to determine the status of his charge with the EEOC and to expedite the proceedings. At no time during this period did respondent receive any written communication from the EEOC informing him of the status of his charge. What information he did receive concerning the status of his charge he received indirectly from his Congressman.

At no time during the pendency of the EEOC proceedings was respondent advised by his Congressman, Senator, President or any agent or employee of the EEOC or the FEPC that he could bring suit against petitioner, nor was he advised that the state statute of limitations might operate to bar his independent right to sue in federal court pursuant to Title VII if the EEOC was not successful in resolving the matter.

Finally, on or about August 17, 1976, respondent received his first written communication from the EEOC notifying him that it had not found reasonable cause to believe that his charge was true (hereinafter referred to as the "right to sue letter"). In addition, the letter notified him that (1) if he wanted to pursue his charge further, he had the right to sue petitioner in the United States

District Court in the area in which he lived within ninety days from the receipt of that "right to sue letter" and (2) failure to sue within that time period would cause his right to sue to be forfeited.

At all times prior to September, 1976, respondent was not represented by legal counsel in connection with his charge of discrimination against petitioner, or in the resulting proceedings before the EEOC and FEPC. Following respondent's receipt of the "right to sue letter," he retained his present counsel in September, 1976 to institute the instant action and pursue it on his behalf.

On November 11, 1976, less than 90 days after mailing and/or receipt of the "right to sue letter," respondent filed the within action in the United States District Court, Central District of California, to pursue his claim of discrimination against petitioner under the provisions of Title VII.

On December 13, 1976, petitioner filed with that District Court a Notice of Motion to Dismiss. The motion was heard on April 4, 1977, before the Honorable United States District Judge A. Andrew Hauk. The motion was granted by Judge Hauk on the grounds that the action was not timely filed within any applicable state statute of limitations.

On July 19, 1978, the Court of Appeals for the Ninth Circuit reversed the decision of the District Court. That opinion is officially reported at 578 F.2d 814 and a copy thereof is set forth in Appendix A to the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. THE ISSUES RAISED IN THE PETITION HAVE ALREADY BEEN RESOLVED BY THIS COURT IN THE RECENT OCCIDENTAL LIFE INS. DECISION. [1]

A. THE OCCIDENTAL OPINION DID NOT DISTINGUISH BETWEEN THE IDENTITY OF A TITLE VII LITIGANT; THE SAME PRINCIPLES APPLY IRRESPECTIVE OF WHETHER THE PLAINTIFF IS THE EEOC OR THE COMPLAINANT.

In its petition (at pp. 18-19), petitioner acknowledges that in the recent decision in Occidental Life Ins. Co. of Cal. v. EEOC (1977) 432 U.S. 355, 97 S.Ct. 2447, this Court determined that the application of state statutes of limitation to actions brought under Title VII by the EEOC would be inconsistent with and frustrate the underlying policies of Title VII. Nevertheless, petitioner attempts to distinguish the Occidental holding from the present case on the sole ground that our case

[1] Occidental Life Ins. Co. of Cal. v. EEOC (1977) 432 U.S. 355, 97 S.Ct. 2447.

was brought by a private party instead of by the EEOC. In support of this distinction, petitioner relies exclusively on one isolated phrase in the Occidental opinion which has little or no bearing on this Court's decision and which is taken out of context. According to petitioner, the critical language in Occidental is the following sentence:

> "Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administratige duties." Id. at 97 S.Ct. 2456.

An inherent premise in petitioner's argument is that respondent is "a typical litigant against whom a statute of limitations might appropriately run." However, a careful reading of the entire Occidental opinion clearly reflects that a private litigant suing after the EEOC has completed its investigation is no more a typical litigant than is the EEOC when it sues following such an investigation.

The Occidental decision distinguishes between defendants in "Title VII civil actions" and defendants in a "private action" in the context of illustrating that the former class is not prejudiced by inflexible time limitations on instituting suit. Id. at 97 S.Ct. 2458. This distinction was expressed as follows:

> "Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the

possibility of an enforcement suit within 10 days after a charge has been filed." Ibid. (Emphasis added.)

When this Court is discussing the "typical litigant," it is referring to one who is not a party to a Title VII proceeding. This is true irrespective of whether the party is a plaintiff or defendant. Thus, when this Court related that the EEOC was not a typical litigant against whom a statute of limitation might appropriately run, it was obviously referring to any Title VII plaintiff who refrained from filing suit until the EEOC discharged its administrative duties.

Moreover, the Occidental opinion discloses that the same federal policies which compel the conclusion that employing a state statute of limitations would be contrary to the purposes of Title VII are applicable irrespective of whether the ultimate party commencing litigation following an EEOC investigation is the EEOC or a private litigant. In discussing the particular underlying policies of the federal statute, this Court, in Occidental (at 97 S. Ct. 2455-56), emphasized that when Title VII was first enacted, Congress selected cooperation and voluntary compliance as a preferred means of achieving the stated goal of the legislation. According to this Court's opinion, Congress originally created the EEOC to act as the administrative agency to achieve voluntary compliance with Title VII prior to the time an aggrieved party would be permitted to file a lawsuit. The decision noted that, although the subsequent amendment to Title VII in 1972 empowered the

EEOC to institute civil actions, Congress preserved the administrative functions described above. This Court then described its resulting conclusion regarding the applicability of state statutes of limitation to Title VII actions as follows (at 97 S. Ct. 2456):

> "In view of the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court, it is hardly appropriate to rely on the 'State's wisdom in setting a limit . . . on the prosecution. . . .' Johnson v. Railway Express Agency, supra, 421 U.S., at 464, 95 S.Ct., at 1722. For the 'State's wisdom' in establishing a general limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities. (Citations omitted.) Indeed, the one-year statute of limitations applied by the District Court in this case could under some circumstances directly conflict with the timetable for administrative action expressly established in the 1972 Act." (Footnote omitted.)

These same policy considerations are present irrespective of whether the ultimate litigant is the EEOC or a private party. If either a private litigant or the EEOC was to initiate a lawsuit prior to the completion by the EEOC of its administrative functions because of the operation of a state statute

of limitations, the federal policy requiring investigation and administrative resolution by the EEOC prior to suit will be completely frustrated. In other words, a claimant who is pressured into filing a suit before the EEOC has com pleted its administrative duties to avoid the expiration of a state limitation period will just as readily frustrate the congressional purposes of Title VII as would an action by the EEOC under those conditions.

B. CONGRESS DID NOT INTEND TO REMOVE THE RIGHT OF A PATIENT EMPLOYEE TO SUE AFTER THE EEOC HAS CONCLUDED ITS INVESTIGATION WHEN IT AFFORDED AN IMPATIENT EMPLOYEE THE RIGHT TO DEMAND A RIGHT TO SUE LETTER FROM THE EEOC AFTER 180 DAYS.

The contrary position advanced by petitioner that state statutes of limitation apply to Title VII actions by private litigants would totally negate the meaning and impact of §706(f)(1) of Title VII. That provision empowers a private litigant to commence litigation within 90 days after receipt of a right to sue letter from the EEOC following its dismissal of the investigation. According to petitioner, a claimant who filed his charge with the EEOC and elected to follow the alternative preferred by Congress of having the charge reviewed by the EEOC would be precluded from

a trial on the merits if the EEOC was unsuccessful in resolving the charge and the state statute of limitation had expired.

Petitioner's position would produce a result that is directly contrary to the intent of Congress in extending to private claimants an option to demand a right to sue letter 180 days after the filing of the charge although the EEOC has not concluded its investigation. According to the Occidental opinion, the option to demand a right to sue letter was extended to the impatient claimant as an alternative to waiting until the EEOC had completed its activities; the demand of a right to sue letter was not intended to be the required course of action. In that regard, this Court quoted the following language from the 1972 Congressional Record (118 Cong. Rec. 7168, 7565):

> "'The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person aggrieved to elect to pursue his his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
>
> "'It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through

the offices of the EEOC. . . . However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.'" (Footnote omitted.) (Emphasis added.) Id. at 97 S.Ct. 2454.

This quotation clearly reflects that Congress intended to preserve the right of a private litigant to sue after the EEOC has dismissed his charge after its investigation. To impose an obligation upon the claimant to sue before the EEOC has concluded its investigation would contravene that expressed intent as well as the congressional desire that the exercise of the option to sue prematurely would be the exception and not the rule.

The logical extension of petitioner's argument would require a conclusion that Congress, when it afforded the option to the impatient grievant to refrain from waiting until the expiration of the EEOC proceedings, took away the right of a patient grievant to cause his claim to be resolved finally by a judicial tribunal. If petitioner's version is correct, an employee who elected to follow the congressional preference of permitting the EEOC to consider the matter fully would be finally bound by any unsatisfactory EEOC determination. This would be true even though the action by the EEOC was not the product of a full and fair evidentiary proceeding.

Yet, under those same circumstances, the employer of the patient grievant would not be so bound and, in fact, could force the matter into the judicial forum simply by inaction. Such a disparate treatment is totally contrary to the expressed desire of the legislators that the primary purpose of the 1972 amendments was to afford fairness to all affected parties. This goal was acknowledged in the very quotations set forth by petitioner at pages 16-17 of the petition.

Dilatory tactics by the employer are encouraged by the impossible choice imposed upon the employee by virtue of petitioner's position (i.e., the choice either (1) to abandon hopes of resolution by or assistance from the EEOC and commence suit at great personal expense, or (2) to abandon the right to bring suit later if the EEOC cannot and does not resolve the matter).

The longer the employer prolonged the administrative investigation by the EEOC, the sooner the claimant would be forced to make this unpleasant election. This action would increase the possibility of causing the potential defendant to face only an impecunious private litigant, instead of an arm of the United States government, the EEOC. As the committee report which accompanied the Senate version of the 1972 amendments to Title VII explained:

> "This disparity between complainants and respondents in Title VII litigation has been recognized by the courts which have characterized the disputes as 'modern day David and Goliath

confrontation[s].' In such situations, the public has an overriding interest in protecting the individual from the denial of those rights which Congress has specifically provided. (Footnote omitted.)" S. Rep. No. 92-415, 92 D. Congress, 1st Sess., at 17 (1971).

Furthermore, federal courts have long recognized that the administrative procedures enunciated in Title VII are designed so that an individual with a claim of employment discrimination need not seek the advice of an attorney. See, e.g., Mahroom v. Hook (9th Cir. 1977) 563 F.2d 1369, Davis v. Valley Distributing Co. (9th Cir. 1975) 522 F.2d 827, 831. The application of the position asserted by petitioner would require the employee to obtain legal counsel at the earliest possible date so that the individual can make the impossible decision as intelligently as possible. In fact, the employee would need legal assistance at the initial administrative stages to provide advice as to the duration of the applicable state statutes of limitations, and any related matters such as tolling, etc. In such an event, there would be total frustration of the broad structure and purpose of Title VII, as established by Congress, which "relies upon laymen operating without legal assistance, to initiate both administrative complaints and lawsuits." Mahroom v. Hook, supra.

As we will illustrate in a subsequent argument (infra, at pp. 23-25), a potential defendant will not be treated unfairly by this Court's extension of the Occidental holding to a Title VII action that is

maintained by a private litigant. We will show that, in Occidental, this Court directly faced this issue and specifically stated that where a defendant is significantly handicapped by an inordinate EEOC delay, or is otherwise prejudiced by a grievant's unexcused conduct, the trial court may restrict or even deny back pay relief.

In other words, a federal court has the power to afford protection to a defendant who is unfairly prejudiced. However, a private litigant who has suffered because of an EEOC delay, for example, could not be rescued by the federal court if the delay caused him/her to refrain from filing suit until after any applicable period of limitations has expired. Clearly, the need for fairness deeply appreciated by the senators upon whose statements petitioner relies dictates that Occidental be extended to all Title VII actions, irrespective of the identity of the plaintiff.

Finally, if the position advocated by petitioner were implemented, there would be absolute no advantage for a claimant to place his fate in the hands of the EEOC where the best he could do, absent a compromise, would be to have his judicial remedy pursued by the EEOC instead of himself. If the EEOC were not so inclined, the claimant would be barred forever from pursuing his own judicial remedies. Thus, the only logical course of action for a claimant to pursue would be to exercise his option to demand a right to sue letter so as to avoid forfeiture of any right to utlize the judicial process and secure a full and fair adjudication on the merits.

Such a result would be directly contrary to the congressional expression which this Court described as the "final and conclusive confirmation of the meaning of Section 706(f)(1)":

> "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC." Id., at 97 S. Ct. 2454.

The same policy considerations relied upon by the Supreme Court in Occidental in support of the conclusion that state periods of limitation should not be used to frustrate the expressed purpose of Congress in encouraging full and complete action by the EEOC are equally applicable to our situation. There is absolutely no logical basis for distinguishing between the identify if the party filing suit (i.e., EEOC or grievant) where the grievant has elected to refrain from suing prematurely in order to permit the EEOC to investigate the matter fully and make all efforts to attempt to resolve the problem administratively. In either case, the same federal policies will be advanced if state statutes of limitations are not applied.

C. OCCIDENTAL HAS ALREADY ESTABLISHED THAT TITLE VII CONTAINS ITS OWN PERIOD OF LIMITATIONS; HENCE AN OVERALL LIMITATIONS PERIOD IS NOT REQUIRED.

Petitioner argues (at p. 8) that the time limitations set forth in Title VII do not establish an overall period of limitations. Assuming, arguendo, that petitioner's analysis is accurate, we fail to perceive the necessity for such an argument. In other words, petitioner has failed to establish that it is essential that every right to sue be governed by "an overall period of limitations."

To the contrary, the most ready response to petitioner's argument is that in Occidental this Court has just held that the EEOC may bring an action under Title VII without being bound by any "overall period of limitations."

The Occidental decision acknowledges (at 97 S. Ct. 2457) that Congress did reflect concern for the need of certain time limitations in the fair operation of the Act. The opinion emphasized, however, that this concern was directed exclusively to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator. This Court illustrated (at 97 S. Ct. 2457) that the congressional intent was clear that "the statue of limitations problem was perceived in terms of these provisions rather than in terms of a later

limitation" on the power to sue. As a result, the opinion concluded:

> "The fact that the only statute of limitations discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure -- a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." Id., at 97 S.Ct. 2457-58.

Again, the same concern is applicable irrespective of whether the ultimate civil action after the EEOC has concluded its investigation is to be filed by the EEOC or the grievant. These periods of limitation relating to the commencement of the proceeding before the EEOC apply equally to either situation. Failure to comply bars suit by either party.

In support of its position, petitioner relies upon certain language in the case of Johnson v. Railway Express Agency, Inc. (1975) 421 U.S. 454, 95 S.Ct. 1716. However, a careful reading of Johnson reflects that there was no mention of the phrase "overall period of limitations," let alone any determination that, absent its presence in a federal law, a state statute of limitations must

always apply. To the contrary, Johnson merely held that, with respect to an action brought under 42 U.S.C. §1981, a state statute of limitations would be applied because (1) that Act does not contain any period of limitations whatsoever, and (2) there is no underlying federal policy that would be contravened by the application of a state statute of limitations. This Court emphasized that an action brought under §1981 is completely separate and independent from a Title VII action. It also related that there was no legislative policy in favor of encouraging investigation of complaints of §1981 violations by the EEOC and resulting attempts at conciliation, as follows:

> "We are satisfied, also, that Congress did not expect that a §1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's effect to obtain voluntary compliance." Id., at 421 U.S. 461, 95 S.Ct. 1720.

Johnson indicated that, because these two actions were separate and apart, it was not unfair or unreasonable for an employee who elects to present his case for full consideration by the EEOC pursuant to Title VII to accept the attendant risk that any time delays would result in a forfeiture of his §1981 action. However, to carry that conclusion one step further to deprive him of his cause of action under Title VII is a matter totally removed from the consideration set forth in Johnson and directly contrary to the holding in Occidental.

II THE ASSERTED EVILS RESULTING FROM THE DECISION OF THE COURT OF APPEALS EITHER (1) MUST BE PRESENTED TO CONGRESS FOR REMEDY OR (2) HAVE ALREADY BEEN ADDRESSED BY THE OCCIDENTAL OPINION.

In its petition (at pp. 5-8), petitioner devotes much effort attempting to illustrate the inefficiency of the EEOC and the resulting backlog of cases. Petitioner argues that, unless this Court imposes an overall period of limitations restricting the time within which a private litigant can seek judicial relief, Federal District Courts will be inundated with "stale" claims. Petitioner also recites policy considerations in furtherance of sound employer-employee relations (at pp. 12-13) which would be thwarted if this Court did not impose a specific overall period of limitations. Finally, the petition contends (at pp. 13-18) that, if the decision of the Ninth Circuit Court of Appeals is permitted to stand, all parties will be denied a fair trial because of the loss of evidence through witnesses becoming unavailable and memories dimming, etc.

A. PETITIONER'S CONCERNS MUST BE ADDRESSED TO CONGRESS

Our initial response is that these matters are appropriately the subject of legislative

consideration, and are not properly addressed to this Court. The appropriate means for avoiding these evils or promoting the policies sought to be advanced by petitioner would be to secure through Congress an amendment to Title VII inserting a prescribed period of limitations to govern those situations. However, petitioner seeks to accomplish those objectives through a decision of this Court which has the effect of denying to respondent the opportunity to pursue his claim of discrimination, even though respondent proceeded with extreme diligence throughout this entire proceeding. Such a procedure would be totally foreign to well established principles of jurisprudence as enunciated repeatedly by the opinions of this Court. See, e.g., Blount v. Rizzi (1971) 400 U.S. 410, 419, 91 S.Ct. 423, 429.

B. THE OCCIDENTAL OPINION HAS ALREADY CONSIDERED AND DISPOSED OF THE CONCERNS EXPRESSED BY PETITIONER.

Secondly, petitioner's concerns were addressed by this Court in the Occidental opinion. As we noted earlier, the Occidental decision emphasizes that the strong preference of Congress was to secure administrative resoltuion of claims. The opinion also reflects that the Legislature demonstrated an awareness of the time lags involved in the EEOC proceedings but nevertheless substantially increased the workload of the agency by the 1972 amendments. Occidental Life Ins. Co. of Cal. v. EEOC, supra,

97 S. Ct. 2457. This Court concluded that it would not be reasonable to assume that, with that state of mind, Congress would have granted to the EEOC additional enforcement responsibilities while limiting the time within which federal lawsuits could be commenced by claimants who were dissatisfied with EEOC action. Ibid.

In other words, in Occidental, this Court determined that it would be totally inconsistent for Congress, on the one hand, to talk about the strong desire to secure administrative disposition of claims and avoid judicial proceedings and yet, on the other hand, to force claimants to go to court by increasing the workload of the EEOC to such an extent that, as a practical matter, it could not resolve the claims within the 180 day period. This Court reconciled those considerations by the only logical conclusion: i.e., the option to demand a right to sue letter after 180 days and, thereafter, to commence suit within 90 days of receipt of that letter, was simply an additional available course of action, not the only opportunity to sue.

In fact, as we noted in our previous argument (at p. 16), it is petitioner's position that a requirement that an election to sue must be made after 180 days will serve to congest federal courts. Circuit Judge Hufstedler, in her concurring opinion, and particularly in footnote 9 (at pp. 24-25 of Appendix A to the Petition), illustrates that petitioner's arguments will contravene the recognized goal of administrative resolution of claims by the EEOC.

Petitioner's other concerns regarding the potential deprivation of a fair trial to the employer

were also specifically addressed in Occidental, as follows (at 97 S. Ct. 2458):

> "The absence of inflexible time limitations on the brining of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, (footnote and citations omitted), and when the EEOC has terminated its efforts to conciliate a dispute, (citation omitted).

"It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief." (Citation omitted) (Emphasis added).

Naturally, the same protections afforded to Title VII defendants in actions by the EEOC are likewise present when the claimant sues. In fact, greater protection is provided the potential defendant in cases where the EEOC dismisses the charge and places the decision to commence suit in the hands of the private complainant. Once the complainant is notified that the EEOC has dismissed the charge, the suit must be brought within 90 days. On the other hand, if the EEOC elects to bring suit, Title VII imposes no time restrictions. If this Court can determine that the open-ended situation where the EEOC is the plaintiff is consistent with underlying federal policies, certainly the former state of affairs which limits to 90 days the right of a private litigant to sue is tolerable. In other words, if congressional intent permits the circumstance where the duration of both the EEOC investigation and its right

thereafter to sue are unlimited, such intent necessarily allows the situation where only the investigation is without any time restrictions.

III ANY APPLICABLE STATUTE LIMITATIONS WAS TOLLED DURING THE PENDENCY OF THE PROCEEDINGS BEFORE THE EEOC.

A. FEDERAL POLICY CONSIDERATIONS DO NOT PRECLUDE THE TOLLING OF ANY APPLICABLE PERIOD OF LIMITATIONS WHILE THE EEOC PROCEEDINGS WERE PENDING.

Apparently, petitioner has abandoned the argument strongly asserted before the Ninth Circuit Court of Appeals that, under the principles of both federal and California law, any applicable state statute of limitations was not tolled while the EEOC possessed jurisdiction over respondent's claim. Instead, petitioner now argues that overall considerations of federal policy should operate to preclude the operation of the applicable "tolling principles." The basis for petitioner's contention is that, unless such policy considerations are applied, there would be no "overall period of limitations," as there would be no restriction on the length of time which the EEOC could maintain jurisdiction.

In response, we must again emphasize that these asserted policy factors were considered by this Court in Occidental. Nevertheless, the court determined that it would permit the institution of a Title VII suit in federal court following the completion of the EEOC proceedings, irrespective of the fact that there were no prohibitions limiting the duration of those proceedings and the litigation was commenced well after the expiration of any potential state statute of limitations. We have illustrated in our earlier arguments, at great length, that the identical rationale and overriding policy considerations relied upon by this Court are equally applicable to our situations, where the only difference is the identity of the plaintiff. Accordingly, those federal policy considerations asserted by petitioner are outweighed by those more significant countervailing factors relied upon by this Court in Occidental. Hence, they cannot operate to remove the application of any "tolling principles" that would preserve the sanctity of the EEOC proceedings and accomplish the desired goal of encouraging administrative resolution of disputes.

B. PRINCIPLES OF FEDERAL LAW REQUIRE THAT ANY APPLICABLE STATUTE OF LIMITATIONS BE TOLLED WHILE THE EEOC HAS JURISDICTION.

Petitioner again seeks support from this Court's decision in Johnson v. Railway Express

Agency, supra. In Johnson, this Court related that federal law and policy did not require that a §1981 action be tolled during the pendency of EEOC proceedings. However, that holding was not intended to extend, and should not be extended, to any and all federal civil rights suits.

In Johnson, this Court distinguished two cases cited in support of the proposition that any state statute of limitations governing the time within which a §1981 action shall be brought must be tolled during the pendency of EEOC proceedings: [American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S.Ct. 756, and Burnett v. New York Central R. Co. (1965) 380 U.S. 424, 85 S.Ct. 1050.] In that connection, the court made the following pronouncement (at 411 U.S. 467, 95 S.Ct. 1723-24):

> "Finally, and perhaps most importantly, the tolling effect given to the timely prior filings in American Pipe and in Burnett depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration beccause the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.14/"

Footnote 14 to the Johnson opinion (at 421 U.S. 467, 95 S.Ct. 1724), reflects that at that time this Court was unsure whether a Title VII charge before the EEOC afforded the employer

with the protection against loss of evidence, the disappearance and fading memories of witnesses and any unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber. The opinion indicated:

> "Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." Ibid.

In our case, the prior filing by respondent with the EEOC, pursuant to Title VII, involves exactly the identical cause of action being asserted in this Title VII suit. Moreover, as we noted in an earlier argument, Occidental resolved any uncertainty that might have existed when Johnson was decided regarding the protection afforded a party against whom a Title VII charge with the EEOC has been filed. In that regard, this Court stressed that such a prior filing with the EEOC necessarily operated to avoid any evil against which the statute of limitations was designed to protect, as follows (at 79 S.Ct. 2458):

> "The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims.

> Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, (footnote omitted and citations omitted), and when the EEOC has terminated its efforts to conciliate a dispute (citation omitted)."

Accordingly, this Court must rreject any contention that Johnson holds that any applicable state statute of limitations shall not be tolled during the pendency of the EEOC proceedings. To the contrary, if a state period of limitations were, for some reason, held to apply to our proceeding, an application of principles of federal law requires that any such statute of limitations be tolled during the pendency of the EEOC proceedings. American Pipe & Construction Co. v. Utah, supra; Burnett v. New York Central R. Co., supra.

The Circuit Courts of Appeal have tolled state statutes of limitations in claims under Title VII for back pay. Prior to 1972, Title VII contained no limitations period respecting an award of back pay. Federal courts therefore borrowed the most applicable state statute of limitations. However, the courts calculated the limitations period for back pay from the date of the filing of a claim with the EEOC rather than from the date of the judicial complaint. The rationale behind this course was that the filing of the EEOC claim tolled the limitations period and that it remained tolled "during such time as the processes of agency reconciliation are at work and until notification to the complainant that voluntary compliance cannot be obtained." Franks v. Bowman Transportation Co. (5th Cir. 1974) 495 F.2d 398, 405, cert. denied, 419 U.S. 1050 (1974); see also, Johnson v. Goodyear Tire & Rubber Co. (5th Cir. 1974) 491 F.2d 1364, 1378; United States v. Georgia Power Co. (5th Cir. 1973) 474 F.2d 906, 925.

Title VII limitations themselves have been tolled by the Circuit Courts of Appeal on the ground that since the statute requires recourse to the EEOC prior to suit, victims of discrimination should hot be penalized because of EEOC delays and errors over which they have no control. See, Choate v. Caterpiller Tractor Company (7th Cir. 1968) 402 F.2d 357; and Gates v. Georgia Pacific Corp. (9th Cir. 1974) 492 F.2d 292, 295. The time limitations of Title VII have also been tolled where delay is attributable to non-EEOC parts of the federal government. See, Harris v. Wallgreens Distribution Center (6th Cir. 1972)

456 F.2d 588, 592; Harris v. National TCO. (7th Cir. 1971) 454 F.2d 307, 312.

C. IF A STATE STATUTE OF LIMITATIONS IS TO BE BORROWED, THAT STATE'S LAW AS TO THE TOLLING OF THE STATUTE MUST ALSO BE APPLIED.

In Johnson, this Court noted (at 421 U.S. 464-65, 95 S.Ct. 1721-22) that, in determining the circumstances under which any applicable state period of limitations is tolled or suspended, the law of the state in question on this issue should be followed absent conflicting federal policy considerations. In that regard, the opinion stated (at 421 U.S. 464-65, 95 S.Ct. 1722):

> "In virtually all statutes of limitations the chronological length of the limitation period is inter-related with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." (Emphasis added.)

Barney v. Oerlrichs (1891) 138 U.S. 529, 530-1, 11 S.Ct. 414, 34 L.Ed. 1037 involved an

action to recover excess fees and charges paid by the plaintiff on imported merchandise. This Court applied New York's six year statute of limitations for actions against tax collectors; at the same time, the court also applied New York's law requiring the tolling of the statute of limitations during any period that the debtor is absent and resides out of the state.

Thus, if this Court determines that the most appropriate state statute of limitations applies to a Title VII claim by a private litigant, it must also borrow the laws of California regarding the tolling of statutes of limitations.

D. UNDER CALIFORNIA LAW, A STATUTE OF LIMITATIONS MUST BE TOLLED WHILE ADMINISTRATIVE REMEDIES ARE BEING PURSUED.

Under California law, a statute of limitations as to a civil suit is tolled during the pendency of any administrative proceeding which is a prerequisite to the filing of the action. Elkins v. Derby (1974) 12 Cal.3d 410, 115 Cal.Rptr. 641. In Elkins, a personal injury action was commenced beyond the one-year period of limitations set forth in §340(3) of the California Code of Civil Procedure. During the interim, the plaintiff had been exhausting his administrative remedies under the State Worker's Compensation laws. In reversing the trial court's ruling dismissing the action because

it was barred by the one-year statute of limitations, the California Supreme Court held that the action was tolled for the period during which the plaintiff pursued his Worker's Compensation remedy.

In reaching that conclusion, the court made the following pertinent observations (at 12 Cal.3d 414, 115 Cal.Rptr. 643-44):

> "It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding. . . . (Citations)
>
> "[A] line of relatively recent California cases . . . points toward the principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'"

Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482, 107 Cal.Rptr. 777 involved an action against a school district. The California Supreme Court indicated that the running of the statute of limitations was suspended when the

plaintiffs began to exhaust their adminstrative remedy by filing a claim with the governing board of the school district. (However, the court held that because the plaintiffs had failed to raise that theory in the trial court, they were barred from asserting the argument on appeal.)

In discussing the tolling issue, the court made the following statement (at 9 Cal.3d 490, 107 Cal.Rptr. 782):

> "The exhaustion of administrative remedies will suspend the statute of limitations even though no statute makes it a condition of the right to sue. (Citations) . . . When an injured person has several legal remedies, and, reasonably and in good faith, pursues one designed to lessen the extent of the injuries or damages, the statute of limitations does not run on the other while he is thus pursuing the one. (Citations)"

Respondent acted in good faith and reasonably in pursuing patiently and diligently his administrative remedies with the EEOC before bringing suit. During the pendency of the EEOC proceedings he initiated numerous written and telephonic contracts with the offices of the EEOC, the President of the United States, Senator Cranston, and his Congressman. At no time during those communications was he ever advised that he could institute a civil action during the pendency of the EEOC proceedings, or that California statutes of limitations might apply to

bar a subsequent civil action in the federal courts. In fact, it was not until August 5, 1976 that respondent first learned (from Senator Cranston, not the EEOC), that he could request the EEOC to issue a right to sue letter which would allow him to sue in federal court.

Respondent received his first written response to his charge from the EEOC on August 17, 1976. At that time, he was advised that his charge was being dismissed and that he had 90 days in which to commence a civil action in the United States District Court on the allegations contained in his charge. He then proceeded, for the first time, to obtain legal counsel so that such action could be initiated.

From this discussion it is apparent that if California law as to statutes of limitation is to be applied in this case, any applicable state statute of limitations must be tolled for the entire period that the matter was in the hands of the EEOC.

IV THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE ONLY OTHER CIRCUIT COURT OF APPEALS' DETERMINATION REGARDING THIS ISSUE.

Finally, it should be emphasized that the decision below of the Ninth Circuit Court of Appeals does not conflict with any decision of any other Circuit Court of Appeals. In fact, only one other

Circuit Court of Appeals has faced the issue presented herein: the Sixth Circuit in Draper v. United States Pipe & Foundry Co. (6th Cir. 1976) 527 F.2d 515, 522.

Draper acknowledged that, prior to the 1972 amendments, state statutes of limitations were employed for the limited purpose of ascertaining the maximum period for which an individual could recover back pay. The Court held that, following the 1972 amendments, state statutes of limitations were no longer relevant even for this limited purpose. The opinion took extreme pains to emphasize that at no time did the state law apply to determine the timeliness of the institution of a Title VII action by stating (at page 522):

> "Title VII provides specific time periods for the filing of a charge with the EEOC and for commencing a civil action after receipt of the right to sue letter (42 U.S.C. §2000e-5 (3)(f)). Title VII establishes its own statutes of limitations, and state law is irrelevant in determining whether a private individual has lost his right of action under Title VII through the passage of time. (Citations omitted) The record on the stipulations of the parties disclosed that Draper complied with the procedural requirements of Title VII and his suit is not time barred." (Emphasis added.)

As a result of the foregoing, there are no conflicting decisions of the various Circuit Courts

of Appeal that need be reconciled by this Court. To the contrary, the existing decisions of the Circuit Courts, and particularly the decision in this case, thoroughly discuss all of the pertinent issues and succinctly recite the applicable principles of law.

V. CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court deny the Petition for Certiorari and, thereby, support the decision of the Ninth Circuit Court of Appeals.

Dated: November 8, 1978.

Respectfully submitted,

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